Supreme Court, U.S.
FILED

No. 03 698 SEP 13 2003

In The
Supreme Court of the United States

RICHARD A. BRAY,
Petitioner (Pro Se),
v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, ET AL.

Respondents

**On Petition For Writ Of Certiorari
To the First District Court Of Appeal, State Of Florida**

PETITION FOR WRIT OF CERTIORARI

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PETITIONER (*Pro Se*)

QUESTIONS PRESENTED

1. Do the recent amendments of 2001 to Section 110.227, Florida Statutes, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America and the Equal Protection Provisions of the Florida Constitution?

2. Do the recent amendments of 2001 to Section 110.227, F.S., violate the Separation of Powers Doctrine?

3. Do the recent amendments of 2001 to Section 110.227, F.S., violate the principle of *stare decisis*?

4. Due to the unconstitutional issues associated with the recent amendments to Section 110.227, F.S., should these recent amendments be repealed?

5. Should the case of *Bray v. Department of Environmental Protection*, (1st DCA Docket No.: 1D02-2616 and PERC Case No.: CS-2002-074; 17 FCSR 175, 2002) be overruled and reversed?

PARTIES TO THE PROCEEDING

Petitioner is Richard Bray. He brings this action on his behalf and on behalf of all state workers within the State of Florida's Career Service System, a certified class of similarly situated persons.

Respondents are the Florida Department of Environmental Protection, the Public Employees Relations Commission, and the First District Court of Appeal, State of Florida.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the constitutionality of recent amendments to Section 110.227, Florida Statutes, and to review the judgment of the First District Court of Appeal, State of Florida, affirming per curiam the final order of the Public Employees Relations Commission, as both orders enforce the amended statute in question.

OPINIONS BELOW

All motions for oral argument, clarification from the court, and request for written opinion from the petitioner have been denied by the Florida Courts. Therefore, no written opinion has been issued, nor reported. The Final Order from the Public Employees Relations Commission is reported at 17 FCSR 175 (2002).

JURISDICTION

The judgment of the First District Court of Appeal, State of Florida, was entered on June 23, 2003. The order denying the petitioner's Motion / Request for Clarification and Written Opinion was entered on August 14, 2003, by the same court. The Florida Supreme Court dismissed the petitioner's Notice to Invoke Discretionary Jurisdiction on August 29, 2003, just two days after receiving it and prior to receipt of a Brief of Jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Article I, Section 2 of the Constitution of the State of Florida promises equal protection by assuring all persons are equal before the law.

STATEMENT OF THE CASE

This case raises serious questions regarding the constitutionality of recent amendments to the state law that governs the rights of all workers within Florida's Career Service System (Section 110.227, Florida Statutes). Compelling evidence is provided to support this case in the form of actual recent cases that prove equal protection is no longer available to all workers within the state career system. This case is bolstered significantly more by conclusions reached by the Florida Senate's own staff that acknowledge the unconstitutional issues associated with the amendments to Section 110.227, F.S.

(during the stages of bill analysis), as provided herein.

FACTUAL BACKGROUND and PROCEEDINGS

On February 25, 2002, Richard Bray, Environmental Specialist III with the Florida Department of Environmental Protection (the Department) was terminated from his employment. Bray's termination was a result of an approximately 1.5 months long investigation that was initiated by a false complaint of sexual harassment filed against Bray by a coworker who had consensually gone out with Bray a few times over the prior three years. The complainant also filed false criminal charges against Bray and with the help of Investigator William Walls of the Department was successful at getting Bray arrested on February 18th. Over six months later (September 04, 2002), the State Attorney's Office dropped the charges against Bray after a thorough review of the case determined that Bray had not committed the offense of stalking, nor had he made false statements, as falsely alleged by the staff of the Department (Appendix J). The Department expanded the initial complaint into a total of four charges and terminated Bray for sexual harassment, insubordination, conduct unbecoming a public employee, and violation of the computer security policy.

Bray appealed his termination to the Public Employees Relations Commission (PERC) and a hearing was conducted on April 10, 2002. In a bizarre and suspicious turn of events, the Department abandoned the initial charge of sexual harassment. The Department was defeated on the two other most egregious charges of insubordination and conduct unbecoming an employee. However, Bray told the truth during the investigation and the hearing and testified that he did have a few non-work related files on his computer (these non-work related files were discovered when Bray's computer was inspected during the investigation). The three most serious charges filed against Bray were dismissed by the PERC commission, but Bray's termination was upheld due to the first-time minor offense of him having non-work related files on his computer. It was proven during the hearing that these files were of a humorous nature, that these images were emailed to Bray while he was at work by his coworkers, superiors, and friends, and that he didn't show them to anyone, but merely saved them in personal folders on his personal computer at work (Appendix K).

Bray appealed PERC's decision to the First District Court of Appeal (DCA), State of Florida, on September 06, 2002 (Appendix A). Answer and Reply Briefs were subsequently filed by the Department and Bray (Appendix B). Bray provided valid arguments arising from the fact that the Department chose the most severe form of discipline and terminated him for a minor first-time offense that was not even a part of the initial complaint, which was suspiciously abandoned by the Department and dismissed by PERC as merely hearsay. Bray demonstrated that the Department's use of excessive discipline clearly should have been mitigated to a lesser form (an oral reprimand would have been more appropriate had the Department considered the facts that the initial complaint was false, that Bray never showed the non-work related files to anyone, and the fact that Bray's coworkers, and even his supervisor, had also violated the Department's computer security policy). Bray argued that he, and the majority of state workers within the career service system, were no longer protected from unfettered agency authority, excessive discipline, and disparate treatment as PERC's rights to review cases and require mitigation when justified were abolished by the statutory amendment to Section 110.227, Florida Statutes, of 2001 (Senate Bill 466, Section 21 was passed into law by Governor Jeb Bush in 2001. This bill became Chapter 01-43 of the Laws of Florida and amended Section 110.227, F.S. to change the standard for suspensions and dismissals in the career service system, and to change the procedures for appealing disciplinary actions. Specifically, Section 110.227(6)(c),F.S., was amended to remove the rights of disciplined state workers within the career service system who appealed their cases to PERC to have their cases reviewed for the use of excessive agency discipline. This amended section created a class of state workers within the same career service system comprised of law enforcement officers, correctional officers, firefighters, and health care providers that were still entitled to this review and still entitled to have their disciplines reduced to better match the offense, when justified, through the process of mitigation. Section 110.227(7),F.S., was amended to require that PERC review each case without consideration of past cases or any other set of facts, except for cases involving the newly-created class of workers who were still entitled to these rights). Bray argued that this statutory amendment unjustly created a "privileged class" of select workers (law enforcement officers, correctional officers, firefighters, and health care providers) within the career service system that were still entitled to protection against unfettered agency authority, excessive discipline, and disparate treatment. This fundamental and essential protection was historically available to all workers within the same career service system (Appendices B and C).

In his appeal to the DCA, Bray provided significant information that substantiated his claims that the recently amended statute is unconstitutional, including the Senate staff's own analysis of the bill that concluded the provision "likely contravenes *stare decisis* principles and violates the separation of powers doctrine." The Senate staff also concluded that "...the bill may be challenged on equal protection grounds in that it may result... in similarly situated state employees being treated differently with regard to discipline" (pages 101a-105a of Appendix I). Despite these major constitutional flaws, this bill was signed into law on May 14, 2001, by the Governor of Florida.

Bray also bolstered his arguments by providing a list of recent cases that demonstrated that members of the newly-created privileged class [Capers v. Department of Corrections, 17 FCSR 249 (2002); Sanders v. Department of Corrections, 16 FCSR 495 (2001)] who had histories of prior discipline and who were committing more serious offenses than Bray were getting their disciplines reduced through the mitigation process. In some cases [Rector v. Department of Corrections, 16 FCSR 515 (2001)], members of the privileged class of state workers are even committing crimes and getting their jobs back through the use of the mitigation process historically available to all workers within the career service system (Appendix K).

Bray filed a motion requesting oral argument to the DCA on September 06, 2002. This motion was denied by the DCA over five months later on February 21, 2003, with no supporting basis for the denial (Appendix C). The DCA had everything it needed to review the case and make a decision by November 06, 2002, with Bray's submittal of the reply brief (Appendix B). The DCA waited over seven months and issued a per curiam affirmation on June 23, 2003 (Appendix D). No written opinion or basis for their decision was provided. Bray promptly filed a motion for clarification and request for written opinion on July 08, 2003 (Appendix E). The DCA again denied this request on August 14, 2003, with no written basis for the denial (Appendix F).

Bray then requested the assistance of the Florida Supreme Court by filing a Notice to Invoke Discretionary Jurisdiction with the Court on August 27, 2003. Bray had 10 days from filing the notice to file a Brief of Jurisdiction explaining why the Supreme Court had jurisdiction to review the case. Bray was diligently drafting this document, however, the Supreme Court did not even give

Bray a chance to submit the brief. The court dismissed Bray's request just two days after receiving the notice and prior to even receiving the brief (Appendices H and I).

Bray has put together a solid case with actual supportive cases that vividly illustrate and substantiate how the recently amended state statute in question is unconstitutional. Unfortunately, the merits and importance of Bray's case have been rejected and ignored by the State Courts. Bray has pursued and exhausted every possible legal means to correct the obvious injustice. The course of events that have transpired to date and the specifics of the case have necessitated Bray's current appeal to this Court.

REASONS FOR GRANTING THE WRIT

I. Recent amendments to a state statute affect thousands of workers and are of great public and national importance.

The constitutionality issue of the recently amended statute (Section 110.227, F.S., as amended in 2001) is of great public importance as it affects the careers and lives of the thousands of workers within the State of Florida's career service system (in 1999 there were 119,878 workers within the state career service system in Florida). These multitudes of state workers interact with and provide valuable services to vast numbers of additional people who reside throughout the state and millions of people who are visiting the state from across the nation and the world (Florida has long been recognized as a leading tourist destination). Even though the issue of the constitutionality of the amended statute has not been widely publicized to date, it would most certainly be of great public importance if it were sufficiently known by the public.

II. Recent amendments to a state statute are unconstitutional and are having devastating results on fundamental individual rights, their careers, and their lives.

Article I, Section 2 of the Florida Constitution and Section 1 of the 14th Amendment to the United States Constitution set forth constitutional guarantees of equal protection, which require reasonable conformity when dealing with similarly situated persons. The recent amendment to Section 110.227, F.S., is challenged on equal protection grounds in that it results, particularly when read in conjunction with the sentence discussed above, in similarly situated state employees being treated differently with regard to discipline. In order for this provision to be constitutional, the classification created by the legislation must be rationally related to achievement of a statutory purpose. In other words, any disparate treatment of state employees, which may ensue from this provision, must be rationally related to achievement of a statutory purpose (the amended statute provides no rationale to achieve a legitimate state purpose. The only indication of such legitimate state purpose is provided by the statements made by the legislative staff in their Senate Staff Analysis (Appendix I). The Senate Staff indicate that the purpose of the bill is to increase employee accountability and provide supervisors with greater flexibility to manage their employees within the career service system). However, Bray has provided a list of cases that demonstrate members of the newly-created privileged class are committing more serious offenses than Bray, committing these offenses more often, and getting their jobs back through the disciplinary review and mitigation process; the process that was historically available to all workers prior to 2001, but now only applies to the privileged class (Appendix K – Sanders; Capers). In some cases, members of the privileged class are even committing crimes, being convicted of crimes, and getting their jobs back through PERC and the mitigation process (Appendix K – Rector)! What compelling state interest and rational purpose is achieved by allowing some workers within the career service system to commit crimes and get their jobs back while upholding the termination of other workers for lesser offenses within the same career system? Clearly, there is none. Bray uses his own case as an example to show the negative consequences and disastrous ramifications that have resulted from the implementation of the unconstitutional statute, as amended and signed into law in 2001. Bray was a good employee of the state for over 12 years who won numerous awards during his tenure. He was terminated, jailed, his career with the state ruined, and the life as he knew it destroyed as a result of false allegations, but his termination was upheld because he had a few non-work related files on his computer of a humorous nature (a common and harmless offense by many workers within the state career service system). Because Bray was not a member of the privileged class, he was not entitled to a review of the degree of disciplinary action administered to him, nor was he entitled to mitigation for such an extreme level of discipline. Meanwhile, members of the privileged class of workers within the same career service system are creating more serious offenses (even crimes) and getting their jobs back through the mitigation process! This is not equal protection under the law!

Chapter 01-43, Laws of Florida, Section 22 creates a legislative classification which distinguishes between Career Service employees represented by petitioner and a newly-created "privileged class" employed as law enforcement officers, correctional officers, firefighters, and professional health care providers. With respect to the majority of the workers within the career service system, the amended sections of the statute prohibit PERC, when reviewing a disciplinary action taken against an employee, from considering either case precedent or evidence indicating disparate imposition of discipline, and prohibits PERC from reducing the penalty when it finds evidence indicating the penalty should be mitigated. The prohibitions do not apply when PERC is reviewing discipline against the members of the privileged class of workers. There is no legitimate rationale for this legislative classification. The classification thus violates the constitutional equal protection guarantees embodied in Article I, Section 2 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States.

Because these sections of the statute impinge upon fundamental rights protected by Article I, Section 6 of the Florida Constitution, heightened scrutiny of the classification is appropriate. The difference in legislative treatment of the two classifications of public employees is not justified by a compelling State interest, and the means chosen do not promote the State interest in the least restrictive manner. The classification thus violates the constitutional equal protection guarantees embodied in Article I, Section 2 of the Constitution of the State of Florida. Further, since the classification has no apparent legitimate rationale, it also violates the Fourteenth Amendment to the Constitution of the United States.

III. Recent amendments to a state statute and the decision of a state court of appeal to affirm said statute contravene accepted and essential judicial principles and doctrines. Such contravention calls for an exercise of this Court's supervisory power.

The amended statute provides in Section 110.227(6), F.S., that: "Each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts." Strictly construed, this provision appears to mean that each time the PERC or the court reviews an employment case, it would not be permitted to consider any previous PERC order, nor any prior case law. Moreover, the judiciary would effectively be prohibited from issuing binding precedent when reviewing PERC orders.

From a pragmatic standpoint, this provision will result in a substantial increase in labor for both the PERC and the courts. Furthermore and more importantly, this new provision contravenes *stare decisis* principles and violates the separation of powers doctrine. As explained by the Tenth Circuit:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78,2 L.Ed. 60(1803).This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); Cohens v. Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821); Anastasoff v. US., 223 F.3d 898(8th Cir. 2000).

Thus, one purpose of the *stare decisis* doctrine is to keep the law stable. Another purpose is:

> ... according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the 'judicial power,' i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries 258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions...." Id. at 259; Anastasoff, 223 F.3d at 902.

The purposes of *stare decisis* are defeated by the provision in the amended Section 110.227(6), F.S. There is now no guarantee of stability in the law as each time the PERC or the court reviews a case, it will be one of first impression; i.e., each time the PERC and the court will have to interpret anew what the law means and how it should be applied to the instant facts. Moreover, the new law violates the separation of powers doctrine by prohibiting the judiciary, which is constitutionally responsible for interpreting the law, from rendering binding interpretations.

The petitioner's own case can be used to additionally demonstrate how the recently amended statute violates the separation of powers doctrine. Bray was dismissed for allegedly committing four types of misconduct. PERC dismissed the three most egregious charges filed against Bray after the Department suspiciously abandoned the charge of sexual harassment. It was this charge that initiated the full-blown investigation of Bray which resulted in the non-work related files being discovered on his computer. As a result, the Department charged Bray with a violation of its Computer Security Policy and terminated him.

There is a range of disciplinary action that an Agency can administer for specified offenses. The mere existence of a range indicates the exercise of discretion by the Agency. This discretion must not be unbridled. The Agency must prove "cause" for the discipline selected or action taken. The discipline selected must be compatible with the severity of the offense and how many prior times it has been committed by the offender. The preferred and just method of administering discipline for minor offenses is to administer the discipline starting with the lowest level (an oral reprimand) and increasing the level of discipline as the severity or frequency of the offense is committed up to dismissal of the offender. Allowing an agency to utilize a wide range of disciplinary measures without the constraint of matching the offense with the punishment vests unbridled discretion in the agency and results in disparate treatment among similarly situated employees. This unbridled agency discretion is in direct conflict with the law. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985). In Bray's case, the Department failed to provide any basis for the extreme discipline selected. The Department chose the most severe discipline for a first-time minor offense of Bray having non-work related files on his computer and dismissed Bray without providing any justification for their use of the most severe punishment. Additionally, to date, there has been no discipline administered by the Department to Bray's coworkers and supervisor who also admitted to violating the same computer security policy.

An agency may select the most severe discipline under its guidelines but does so under the obligation to prove "cause" sufficient to warrant the discipline selected. In the instant case, the unarguably minor violation of computer security policy by Bray cannot constitute "cause" for the maximum discipline of dismissal.

In the PERC Commission'sown words it states that the amended statute (Section 110.227(6), F.S.) grants to the "...agency unfettered authority to impose the most severe penalty allowed by the law and its rules for any offense proven." (Appendix K – Bray case). Unfettered authority and unbridled discretion are synonymous, and both lead to violation of the separation of powers doctrine.

In the case of BRAY v. PERC and FDEP, First DCA Docket No.: 1D02-2616; PERC Case No.: CS-2002-074 (Appendix K), the DCA rendered a decision without a written opinion, clarification, or list of cases that supported its decision. By issuing the limited per curiam affirmation, the DCA has upheld the decision reached by

PERC while totally ignoring the bigger issue of the constitutionality of the amended statute as raised by Bray in the Initial and Reply Briefs (Appendices B and C). Additionally, the DCA's decision will allow the continuation of the inequitable treatment of the newly-created privileged class of state workers (law enforcement officers, correctional officers, firefighters, and health care providers). The lack of response and unwillingness of the DCA to address this important constitutional issue necessitates the exercise of authority of this higher Court.

Further proof that the amended statute contravenes accepted and essential judicial principles and doctrines is provided by the Florida Senate Staff's own analysis of the amendment when it was just a bill. The Senate recognizes the unconstitutional issues associated with the bill by concluding it will likely be challenged on grounds that it violates equal protection laws, violates the principle of *stare decisis,* and violates the separation of powers doctrine (pages 101a-105a of Appendix I).

CONCLUSION

In summary, irreparable damage has been done to my career, my family, and my life in general because of the false allegations of a coworker and the Department's decision to use the most severe punishment available to it. I do not profess to be perfect in this, or any other legal document I have prepared. Yes, I had some silly pictures and jokes on my personal computer at work. I accept full responsibility for having these non-work related files. This was the atmosphere in my office that was allowed, and even fostered, by my supervisor and coworkers at the time. Committing this minor first-time offense does not justify the Department's use of the most severe punishment; not even remotely. An oral reprimand would have been more appropriate discipline under the circumstances. Unfortunately and unconstitutionally, since I was not a member of the newly-created privileged class within the career service system, I had no rights to have the level of discipline administered to me assessed and mitigated to a more appropriate level to be compatible with the offense, considering its first-time occurrence and my excellent employment record with no prior discipline.

All workers within the career service system should have equal protection against unfettered agency authority, excessive discipline, and disparate treatment. However, due to the recent amendment to Section 110.227, F.S., only select members of the privileged class of workers within the same career service system retain these rights. This is not equal protection and is unconstitutional!

I reiterate that irreparable damage has been done to me. Recognizing the unconstitutional issues associated with the recently amended statute in question, I have spent considerable time, effort, and money conducting legal research and preparing a case; all in hopes to prevent unjustified pain and suffering of workers similar to myself in the career service system. I cannot think of more convincing evidence to validate my appeal than the Florida Senate's own statements that conclude the bill (passed into law as the amended statute in question in 2001; Section 110.227, F.S.) is unconstitutional and will likely be challenged, and actual recent cases since the bills passage that clearly show members of the privileged class are receiving more protection under the amended law. The Florida Courts have ignored my motions and pleas. I now humbly submit my case and supportive evidence to you. There are significant constitutional flaws in the recently amended Section 110.227, F.S. Please help me correct the obvious injustice.

For the foregoing reasons, I, Richard Bray, respectfully request this Court to grant this petition for certiorari.

Respectfully submitted,

_______________/S/_
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APPENDIX A

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RICHARD A. BRAY,

Employee / Appellant,

FIRST DCA DOCKET
NO.:1D02-2616
vs. PERC CASE NO.:CS-2002-074

PUBLIC EMPLOYEES RELATIONS
COMMISSION and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Agencies / Appellees
_________________________________/

INITIAL BRIEF OF APPELLANT

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ARGUMENT I

IT IS HEREBY ARGUED THAT SECTION 110.227, FLORIDA STATUTES CREATES A LEGISLATIVE CLASSIFICATION AND DISTINCTION AMONG SIMILARLY SITUATED EMPLOYEES OF THE CAREER SERVICE SYSTEM THAT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE PROMISE OF ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION THAT ALL PERSONS ARE EQUAL BEFORE THE LAW 13

ARGUMENT II

IT IS HEREBY ARGUED THAT SECTION 110.227, FLORIDA STATUTES VEST UNBRIDLED AGENCY DISCRETION WITH THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND HAS RESULTED IN ARBITRARY AND CAPRICIOUS ACTION IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE AND MR. BRAY'S FUNDAMENTAL RIGHT TO DUE PROCESS 28

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PRELIMINARY STATEMENT

The following abbreviations and citations are used throughout this Initial Brief:

Richard A. Bray	Appellant/Former Employee of DEP
DEP or Department Or Agency	Appellee, State of Florida Department of Environmental Protection
PERC	Appellee, Public Employees Relations Commission
(V__,p.___)	Citation to Record on Appeal V = Volume p. = Page

STATEMENT OF THE CASE AND THE FACTS

This appeal challenges the constitutionality of a Final Order issued by the Public Employees Relations Commission on grounds that Section 110.227, Florida Statutes as applied in the Final Order violates the constitutional equal protection guarantees embodied in Article I, Section 2 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States.

Appellant, Richard A. Bray, was terminated from his employment with the Florida Department of Environmental Protection on February 25, 2002. Mr. Bray was a 12-year career service employee with an exemplary service record and lack of any prior discipline. Bray's dismissal resulted from a written complaint of sexual harassment filed against him by a coworker. As a result of the complaint, the agency conducted a lengthy investigation and expanded this allegation into a total of four charges of misconduct against Bray. These charges included sexual harassment, insubordination, conduct unbecoming a public employee, and violation of the Agency's computer security policy (V2,p.247).

Bray exhausted available administrative remedies by appealing the agency's dismissal to The Public Employees Relations Commission (PERC)on March 11, 2002. (VI, p. 1-2). A hearing was conducted before PERC on April 10, 2002. A Recommended Order was issued on April 25, 2002 (V2,p.220-236). Exceptions were filed on May 1, 2002 by Bray, no exceptions to the

Recommended Order were filed by the Agency. (V2, p. 237-246). The Final Order No. 02CS-180 was issued by the Commission on May 30, 2002. (V2, p. 247-255).

This appeal was initiated with the timely filing of a Notice of Administrative Appeal on June 27, 2002, by the Appellant herein.

At all times pertinent to this appeal, Bray was a permanent status career service system employee employed as an Environmental Specialist III. He was employed by the Agency for seven years. Prior to that time he worked for another state agency for five years. Bray had never been disciplined prior to his dismissal. (V2,p.221)

As an Environmental Specialist III, Bray was involved in the permitting process for large wetland treatment systems built under the provisions of the Everglades Forever Act.

Frank Nearhoof was Bray's immediate supervisor. Nearhoof considered Bray a good employee. Nearhoof did not object to his subordinates working on non-work related activities during their breaks or at lunch time. (V2,p.221).

On January 24, 2002, Bray was placed on administrative leave while the Agency conducted an internal investigation initiated by a sexual harassment complaint filed against Bray by a coworker. DEP Investigator William Walls conducted the investigation into the complaint filed with the DEP Inspector General's Office.

On February 25, 2002, Bray was informed of four allegations of misconduct supporting his dismissal pursuant to the extraordinary procedures provision of Section 110.227, Florida Statutes. (V2, p. 171, 172). Bray was provided a number of documents, including a copy of the Agency's investigative report, at approximately 10:30 a.m. and told that he could attend a pre-termination conference at 3:30 p.m., on the same day, if he wished to do so. (V2, p.137-170; 171, 172). This deadline would have afforded him only a few hours to prepare for the pre-termination conference and address the charges of sexual harassment, conduct unbecoming a public employee, insubordination and violation of Department computer security policy. Bray was not provided with all the evidence supporting the allegations against him prior to the conference. (V3,p.106-110; V2,p.224)

Bray attended the conference on February 25, 2002 accompanied by his attorney. At the recorded conference, Bray informed the Agency's representative that he had not been provided an adequate opportunity to respond to the allegations. Bray was told he could prepare a written response within two days. Bray did not submit a written response because he felt the time provided was inadequate and because he had not been provided all the evidence against him. (V2,p.225)

The Agency defines sexual harassment, in pertinent part, as "slurs, derogatory statements, discriminatory remarks, or any other verbal or physical conduct of a gender specific or sexual nature, which is offensive or objectionable to the recipient and has the purpose or effect of interfering with the recipient's job performance." (V2,p.186-191, 226)

The Agency defines conduct unbecoming a public employee as "conduct whether on or off the job, that adversely affects the employee's ability to continue to perform the duties of his/her current job, including an act which violates decency or morality, which discredits the department, or which adversely affects the department's ability to carry out its mission." (V2,p.186-191, 225)

The Agency defines insubordination as "a deliberate and inexcusable refusal to comply with a lawful order or directive, written or oral, which relates to the employee's job functions. This includes both expressed refusal to obey a proper order, as well as the deliberate failure to carry out an order." (V2,p.186, 191, 225)

The Agency defines a violation of department computer security policy as "the deliberate failure to abide by the Department's established security policy. This includes: (a) unauthorized release of password, (b) failure to secure computer data, (c) unauthorized copying of licensed software, and *(d) the use of computer for non-work related activities.*" (Emphasis provided). (V2,p. 186, 191, 225)

Under Agency's Directive 435 an employee may be subject to dismissal for a first occurrence of unbecoming conduct, insubordination, violation of the computer security policy, or sexual harassment. (V2,p.186-191,226).

At hearing, in a bizarre turn of events, the Agency inexplicably abandoned the core charge of sexual harassment against Bray, (V2,p.227), the same charge which triggered the investigation and led to the other three charges, including the charge resulting in dismissal. (V3, p. 53). The sexual harassment charge against Mr. Bray was dismissed. Similarly, the insubordination and conduct unbecoming charges were determined to be without basis. Accordingly, the three most egregious charges against Bray were determined to be baseless. (V2,p.247).

The only charge that survived an adjudicatory hearing was that of violation of the Department computer security policy.

During his investigation, Walls discovered eleven (11) non-work related e-mails stored on Bray's computer. Included in these e-mails were pictures of partially nude women and men, jokes of a sexual nature, a cartoon video of a character defecating, a video of a donkey attempting to mount a man, a personal letter of a social and flirtatious nature, and a personal letter regarding an educational book authored by Bray titled "Ana Lee the Manatee." Walls had initially claimed these images were pornographic; however, the Agency modified its classification of these images as simply "non-work related." (V2,p.174-185; V2,p.224)

Except for the personal correspondence which Bray composed, the remaining nine e-mails *were sent to* Bray. Bray stored these e-mails in one of three subfolders on his computer which he created entitled funny clips, letters and pictures. Bray drafted the personal correspondence on his lunch or break time. (V2,p.224)

These items were discovered during the course of the DEP investigation of the later abandoned sexual harassment complaint. The investigation into the sexual harassment complaint involved a two (2) hour interrogation of Mr. Bray and the seizure and search of his state computer. (V2, p. 137-170).

At the hearing before PERC, Bray admitted to having received the nine non-work related files of a humorous nature via e-mail while at work over a period of the past five years. Bray also testified that he did draft two letters of a personal nature while he was on his lunch or break time (V2,p.174-185, 224). Bray's supervisor, Frank Nearhoof, testified that he was aware of non-work related e-mails of a humorous nature being circulated around the office, that he even sent some of these e-mails, and that he didn't have a problem with employees drafting documents of a personal nature while they were on their designated breaks (V3,p.73, 75, 79-81). Bray testified that he considered the jokes he received via e-mail from his co-workers and superiors funny, and saved them to personal folders on his computer, but never passed them on or showed them to anyone (V3,p.35-36, 43, 93-98, 112).

Bray was dismissed for violation of the Department computer security policy, not for receipt of the offensive e-mails, but for the affirmative act of saving them on his computer. Bray's dismissal was upheld by PERC who ruled that the Agency had established that Bray violated the Agency's computer security policy (V2,p.235, 254). The Commission determined that Bray's saving of the e-mails on his computer constituted a violation of the computer security policy. (V2, p. 251). In reaching the decision to uphold the Department's dismissal, PERC recognized Bray's spotless record of service with no prior discipline in his 12 years of service with the State of Florida. (V.2, p. 220). The Final Order states that these facts address mitigation which is not available to Bray since the adoption of the amendments to the career service laws embodied in Section 110.227(6)(c), Florida Statutes, 2001, (V.2, p.232-233, 254).

Section 110.227(6)(c), F.S., deprives all career service employees of mitigation with the exception of a newly created privileged class of employees employed as law enforcement officers, correctional officers, firefighters, and professional health care providers.

PERC acknowledged in its Final Order that it is required to evaluate the constitutional implications and consequences of the application of the statutes which it is charged to interpret and apply. (V2, p. 254). However, PERC stated that it had no authority to rule on the constitutionality of the statutory provision eliminating the Commission's mitigation authority for certain employees. (V2,p.254)

It is this disparate treatment of Mr. Bray, and not other similarly situated permanent Career Service employees, which forms the basis of this Appeal.

SUMMARY OF ARGUMENT

The 2001 Amendments to Section 110.227, F.S.,embodied in Sections 110.227(6)(c) and (7) create a privileged class of Career Service employees. This class is occupied by Career Service employees working as law enforcement officers, correctional officers, firefighters, and professional health care providers. Section 110.227(6)(c), Florida Statutes, 2001 denies mitigation to Career Service employees who are not a member of the privileged class. Mr. Bray is not a member of the privileged class. Clearly, mitigation should be available to Bray in the same manner as it is available to other similarly situated persons (i.e., permanent Career Service employees). It is the unconstitutionality of this recently amended state law that forms the basis for this appeal.

Section 110.227(7), F.S., creates the same privileged classification among similarly situated persons. Section 110.227(7), F.S., unconstitutionally draws a bright line distinction between Career Service employees by job title. Section 110.227, F.S.,prohibits PERC, when reviewing disciplinary action taken against an employee, from considering any other case or set of facts. This prohibition does not apply when PERC is reviewing discipline imposed upon the recently created privileged class of Career Service employees working as law enforcement officers, correctional officers, firefighters, and professional health care providers.

There is no rational basis or compelling state interest which is furthered by creation of this privileged class. No rational basis much less compelling interest exists for this impingement upon Bray's fundamental property interest in career service employment with the State of Florida. The creation of a privileged class among similarly situated career service employees by simple virtue of job classification is unconstitutional. Mr. Bray was denied the benefit of mitigation and precedent enjoyed by his fellow Career Service employees, who are members of the privileged class. This classification among Career Service employees violates the constitutional equal protection guarantees embodied in Article I, Section 2 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States.

Furthermore, Section 110.227, F.S.,improperly vests unbridled discretion in the hands of an administrative agency. The decision reached by the Agency in the instant case to dismiss Mr. Bray for a first offense of the Department Computer Security Policy was arbitrary and capricious. The statutory prohibition against consideration of prior cases or sets of facts, by its very nature leads to arbitrary and capricious results. An agency must establish "cause" for the action taken. The agency action taken in the instant case was dismissal. The statutory amendments appear to have unconstitutionally stripped PERC of any power to alter the action taken (unless you are a member of the privileged class). Even under the amended statute an agency must use reasonable discretion to select the disciplinary action warranted by the alleged violation. Any other interpretation would impermissibly vest an agency with unbridled discretion and leads to arbitrary and capricious results such as the one in the instant case.

The exercise of unbridled discretion by the agency in the instant case violates the doctrine of separation of powers and Mr. Bray's right to due process.

ARGUMENT I

IT IS HEREBY ARGUED THAT SECTION 110.227, FLORIDA STATUTES CREATES A LEGISLATIVE CLASSIFICATION AND DISTINCTION AMONG SIMILARLY SITUATED EMPLOYEES OF THE CAREER SERVICE SYSTEM THAT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE PROMISE OF ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION THAT ALL PERSONS ARE EQUAL BEFORE THE LAW.

Background

Chapter 110, F.S. governs all aspects of the Career Service employment system utilized by the State of Florida since 1971.

Part II of ch. 110, F.S., establishes the Career Service System, and requires the Department of Management Services (DMS) to develop and maintain a uniform classification and equitable pay plan applicable to all positions in the Career Service system; to determine guidelines for employee recruitment and selection to be used by employing agencies; to adopt rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees; and to develop uniform rules, in consultation with affected agencies and pursuant to the approval of the Administration Commission, regarding employee appointment, promotion, demotion, reassignment, separation, status, attendance, and leave.

The terms "career service" and "career service employee" are not defined in the statutes. A "career service employee" may be a short-term or long-term employee. The rules distinguish among probationary, overlap, temporary, trainee, and permanent status.

Section 110.227(1), F.S., provides that any employee who has permanent status in the Career Service system may be suspended or dismissed only for "cause." Cause includes, but is not limited to, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime.

The Public Employees Relations Commission (PERC) was established in 1974 to provide statutory implementation of Art. I, s. 6 of the Florida Constitution (the right of public employees to collectively bargain). PERC is currently composed of a chair and two full-time commissioners appointed by the Governor and confirmed by the Senate. PERC is housed within the Department of Labor and Employment Security for administrative purposes, but is not subject to control, supervision, or direction by that department.

PERC decides cases sitting as a quasi-judicial collegial body and issues final orders. Any appeal of a PERC final order is taken to a District Court of Appeal.

Since 1956, the Florida Constitution has required a civil service system for state employees. Article 3, Section 14 of the Florida Constitution, currently provides:

> By law there shall be created a civil service system for state employees, except those expressly exempted....

The constitution does not define the term "civil service system." Legal commentators, however, have stated:

> While security of tenure in office is an important object of the civil service system, and it has been said that civil service statutes have been enacted to afford state and municipal employees with reasonable job security by protecting them from political considerations and partisanship, and that civil service statutes are designed to secure adequate protection to career public employees from political discrimination, the civil service was not established for the sole benefit of public employees, but also to ensure efficient

public service for state, county, and municipal government.

Currently, Florida's constitutional "civil service system" requirement is implemented by a series of statutes. Section 110.201(1)(a), F.S., provides:

> The department [the DMS], in consultation with agencies that must comply with these rules, are tasked with developing uniform personnel rules, guidelines, records, and reports relating to employees and positions in the career service.

Florida's Career Service System, as found in Chapter 110, F.S., has been amended several times during the course of its existence. The most recent Amendments to Part II, Chapter 110,F.S. are the source of the controversy in the instant case.

Senate Bill 466, Section 21 was passed into law by Governor Jeb Bush in 2001. This bill became Chapter 01-43 of the Laws of Florida and amended s. 110.227, F.S. to change the standard for suspension and dismissal of career service employees. In addition, these amendments changed the procedures applicable to appeal of agency disciplinary actions.

The law requires PERC to affirm the agency head's decision whenever it finds "cause" for the agency action, and to reverse the decision, with or without an award of back pay, whenever it finds that no reasonable cause existed. Under the new law, PERC is no longer permitted to reduce (or mitigate) the penalty imposed by the agency head on an employee who is not a member of the privileged class within the Career Service system. This restriction and establishment of a privileged class is embodied in Section 110(6)(c), F.S., which states:

> (c) If the commission finds that cause did not exist for the agency action, the commission shall reverse the decision of the agency head and the employee shall be reinstated with or without back pay. If the commission finds that cause existed for the agency action, the commission shall affirm the decision of the agency head. (*The commission may not reduce the penalty imposed by the agency head, except in the case of law enforcement or correctional officers, firefighters, and professional health care providers, if the commission makes specific written findings of mitigation*) [Emphasis provided]

Similarly, Section 110.227, F.S. purports to restrict PERC and the instant court's scope of review in disciplinary cases involving career service employees who are not members of the privileged class. Section 110.227(7), F.S.,states:

> Other than for law enforcement or correctional officers, firefighters, and professional health care providers, each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts.

In addition to violating Bray's right to equal protection under the law, as discussed below, Section 110.227(7), F.S. appears to undermine the very foundation of jurisprudence.

Equal Protection

Article I, Section 2 of the Florida Constitution and Section 1 of the 14th Amendment of the United States Constitution set forth constitutional guarantees of equal protection, which require reasonable conformity when dealing with similarly situated persons. As applied, Section 110.227, F.S. violates Bray's right to equal protection in that it results in disparate treatment of similarly situated state employees. Section 110.227, F.S., creates a privileged class of Career Service employees. This privileged class of employees alone enjoy mitigation of disciplinary action and protection from unbridled agency discretion in disciplinary matters appealed to PERC.

The preliminary step in any equal protection analysis is the determination that others, similarly situated, were subject to disparate treatment. *Lisboa v. Dade County*, 705 So.2d 704, 706 (Fla. 3d DCA 1998).

In the instant case, the class of similarly situated persons are the permanent Career Service employees of the State of Florida. Mr. Bray belongs to this class of persons as do most police officers, correctional officers, firefighters, and professional health care providers employed by the State. The plain language of Section 110.227, F.S., treats ordinary members (Mr. Bray) and privileged members of the Career Service system in a disparate manner.

In order for Section(s) 110.227(6)(c) and (7) to comply with equal protection requirements they must treat all people within the permanent Career Service system class the same. Any distinction among permanent Career Service employees must, at a minimum, be based on a rational distinction having a reasonable relation to a legitimate state objective. *T.M. v. State,* 689 So.2d 443, 445 (Fla. 3d DCA 1997).

In general, two standards are applied in equal protection challenges, "rational basis" or "strict scrutiny." Under the "rational basis" standard, the state is not required to convince the court of the correctness of their legislative judgment; instead, those challenging the legislative judgment must convince the court that legislative facts on which classification is apparently based could not reasonably be conceived to be true by a governmental decision maker. *Reinish v. Clark*, 765 So. 2d 197 (Fla. 1st DCA 2000).

Proper application of the "rational relationship" test requires a court to determine (1) whether the challenged statute serves a legitimate governmental purpose and (2) whether it was reasonable for the legislature to believe that the challenged classification would promote that purpose. *Zapo v. Gilreath*, 779 So.2d 651 (Fla. 5th DCA 2001).

The distinction among career service employees found in Section 110.227, F.S., can serve no legitimate governmental purpose. The plain language of Chapter

110, F.S., supplies no basis, rationale or purpose for the creation of a privileged class among career service employees. The absence of any such recognizable purpose renders inquiry into the second prong of the rational basis standard difficult. Without a identifiable purpose it is difficult to determine whether it was reasonable for the legislature to believe that the challenged classification would promote that purpose.

It is tempting to inquire into legislative intent derived from staff analysis or commentary to divine the deeper purpose served by the distinction. However, the statute is not ambiguous, it simply sets law enforcement officers, correctional officers, firefighters and professional health care providers above their fellow Career Service employees. Consequently, no such statutory interpretation is warranted.

On what factual basis did the Legislature distinguish between those Career Service employees who are entitled to mitigation or precedent and those who are not? All permanent Career Service employees are members of the same system. All expect to be treated fairly, and with an even hand. The statute provides no explanation or purpose behind the arbitrary distinction made among Career Service employees.

The legislative fact upon which the classification among Career Service employees is apparently based is a perceived distinction between Career Service members employed as law enforcement officers, correctional officers, etc. and the remainder of the 100,000 plus members of the Career Service system. Furthermore, the creation of this privileged class primarily benefits its members when they are in danger of adverse employment action.

The plain language of the statute simply allows PERC to consider mitigation and precedent when reviewing agency disciplinary action taken relative to career service members employed as police officers, correctional officers, firefighters, and professional health care providers. The plain language prohibits PERC or any reviewing court from considering mitigation or precedent in connection with the remainder of similarly situated career service employees.

This distinction among Career Service employees cannot reasonably be believed to promote any purpose by a governmental decision maker.

The "strict scrutiny" standard used to determine whether a statute violates the equal protection clause generally applies only to statutes which are inherently suspect because they *impinge too greatly on fundamental constitutional rights*, or they primarily burden certain groups that have been the traditional targets of irrational, unfair and unlawful discrimination. (Emphasis provided). *Westerheide v. State*, 767 So.2d 637 (Fla. 5DCA 2000).

Due to the nature of the inalienable right affected in the instant case, the more stringent strict scrutiny standard applies. Section 110.227, F.S. directly impacts the fundamental constitutional right a permanent Career Service employee has in their job. A statute which allows a demotion or dismissal only on the basis of "cause" creates a constitutionally protected interest in public employment. *Doyle v. Department of Business and Professional Regulation*, 713 So.2d 1040, 1045 (Fla. 1DCA 1998). Public employment is a constitutionally protected property interest. *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.ED.2d 120 (1997). (The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' *Joshua v. City of Gainseville*, 768 So.2d 432, 439 (Fla. 2000).)

The statutory amendments embodied in Section 110.227, F.S. are inherently suspect because they impinge on a Career Service employee's fundamental constitutional property interest. Art. I, Section 2, Florida Constitution.

Consequently, in order for Sections 110.227(6)(c) and (7), F.S. to be valid they must be designed to advance a compelling state interest by the least restrictive means. *Westerheide v. State*, 767 So. 2d 637 (Fla.5th DCA 2000).

Section 110.227, F.S., deals with suspensions, dismissals, reductions in pay, demotions, layoffs, transfers and grievances relative to permanent Career Service employees. All of these actions impinge upon a Career Service employee's employment with the State. None impinges more on a career service employee's constitutionally protected property interest more than dismissal.

The plain language of Section 110.227(6)(c), F.S. prohibits PERC from reducing (mitigating) the penalty imposed by an Agency for an infraction. However, in the same breath the Legislature carves out an exception for certain Career Service employees. The Legislature makes the same distinction in Section 110.227(7), F.S.

In making the distinction among career service employees and creating this privileged class, the Legislature identifies no compelling state interest, much less a *rational basis*, that is designed to be advanced by the distinction. This lack of any state interest served by the distinction is not surprising. The statute fails to identify such an interest because there is not one.

What compelling state interest is advanced by distinguishing between an Environmental Scientist III and a professional health care provider who are both determined to have violated an agency's computer security policy?

Applied to the instant case, it stretches the bounds of the imagination to conceive of a state interest that would be advanced by distinguishing between off-color e-mails on a DEP employee's computer versus those found on a firefighter's computer.

A simple hypothetical illustrates the injustice of these statutory amendments. Two Career Service employees both work at the Florida Department of Environmental Protection (DEP). One is a Environmental Specialist III, the other is an officer with the DEP Inspector General's Office. Both employees are permanent Career Service employees. Both employees send each other humorous, if arguably off-color, e-mails on a regular basis. The employees supervisors discover the non-work related e-mail and as a result they are both dismissed. Both of the employees appeal their dismissal to PERC. Both employees have been with the Agency for 12 years and both have outstanding employment records with no prior discipline. PERC finds "cause" for the charges levied against the employees. The internal investigator has the right to mitigation under the current statute, but the environmental specialist does not. PERC orders mitigation for the internal investigator and he gets reinstated with back pay and receives a written reprimand. PERC cannot order mitigation for the environmental specialist, and his dismissal is upheld. The environmental specialist has been stripped of his job, his reputation and career damaged, the circumstances of his case and unblemished record with DEP are ignored. What rational basis compelling state interest, much less rational basis, of the State is advanced under this likely hypothetical?

Regardless of which test is applied, Sections 110.227(6)(c) and (7), Florida Statutes, violate the equal protection clause.

Section 110.227(7), F.S., recognizes the same privileged class relative to consideration of precedent when reviewing Agency disciplinary action. Currently, only members of the privileged class of Career Service employees are entitled to the benefit of prior case law, that is, precedent.

On its face, Section 110.227(7), F.S., appears to mean that each time PERC or a reviewing court rules on a Career Service employment case, the tribunal is not permitted to consider any previous PERC order, set of facts, or prior case law. In effect, other than for members of the privileged classification, the appellate body would be prohibited from relying on or creating binding precedent. This legislative overreaching exemplifies the unconstitutional nature of the classification made between Mr. Bray, a standard Career Service employee and other Career Service employees who enjoy privileged status.

In fact, on its face, Section 110.227(7), F.S.,would appear to prohibit this Court from considering prior decisions and their precedential value, unless the Appellant is a member of the privileged class. Each appeal by the average career service employee like Bray would be considered in a legal vacuum, with only the statutory law as a guide.

Section 110.227(7), F.S., likely contravenes *stare decisis* principles and violates the separation of powers doctrine. As explained by the United States Supreme Court:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L.Ed. 60(1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); Cohens v.

> Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821).

Thus, one purpose of the *stare decisis* doctrine is to keep the law stable. Another purpose is:

> ... according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the 'judicial power,' i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries 258-59.
>
> If judges had the legislative power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions....'

The purposes of *stare decisis* appear to be defeated by the provision in the new law. There would be no stability in the law as each time PERC, the DCA or Supreme Court reviewed a case, it would be one of first impression; i.e., each time the reviewing tribunal would have to interpret anew what the law means and how it should be applied to the instant facts. Moreover, Section 110.227(7), F.S. clearly violates the separation of powers doctrine by prohibiting the judiciary, which is constitutionally responsible for interpreting the law, from rendering binding interpretations in cases involving the average Career Service employee. However, due to the unconstitutional classification, not all Career Service employees will be at such a disadvantage. The privileged class of Career Service employees will continue to enjoy the benefit of precedent and mitigation.

ARGUMENT II

IT IS HEREBY ARGUED THAT SECTION 110.227, FLORIDA STATUTES VESTS UNBRIDLED AGENCY DISCRETION WITH THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND HAS RESULTED IN ARBITRARY AND CAPRICIOUS ACTION IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE AND MR. BRAY'S FUNDAMENTAL RIGHT TO DUE PROCESS.

In the instant case the Agency action taken against Mr. Bray for violation of Department Computer Security Policy was dismissal. The action selected by the Agency for Mr. Bray's alleged violation of computer security policy was the most severe among the range of Agency actions available. The range included basically all disciplinary measures available to the Agency. (V2, p. 186-191). Under Section 110.227, F.S., as revised the

Commission may not reduce the penalty imposed by the Agency; however, the Commission may find that "cause" did not exist for the disciplinary measure selected, dismissal. See, Section 110.227(6)(c), F.S.

As a disciplinary standard, "cause" is an indefinite and flexible standard, which carries with it a consideration of the proposed sanction. What may be "cause" for a counseling session or an oral admonition will not necessarily suffice as "cause" for suspension or dismissal. The statute requires PERC to determine whether "cause" exists for the employer's proposed disciplinary action. Due to the prohibition, discussed above, on PERC from considering the results of other cases, or the treatment of other employees in factually similar circumstances, the statute undermines but does not eradicate PERC's authority to consider the basis of "cause" for the agency action selected. See Section 110.227(7), F.S.

To remove PERC's discretion to consider the circumstances of the case before it when determining if "cause" exists for the agency action selected would impermissibly vest unbridled agency discretion with the Agency. Such an interpretation would eliminate any possibility of consistent and fair decision making, virtually assure disparate treatment, and deny career service employees (other than the privileged class) reasonable notice of the standard of required conduct.

The eleven (11) computer files that were determined to be violations of computer security policy, were discovered as the result of a month and a half long investigation initiated and revolving around a charge of sexual harassment. The Sexual Harassment charge was abandoned by the Agency at Hearing. (V2, p.220-236, 247-255). The alleged violations of computer security policy would not have been uncovered but for the abandoned sexual harassment charge.

The duty is upon the Agency to use reasonable discretion to select the disciplinary action warranted by the alleged violation. The Agency offered no evidence to establish that the disciplinary action selected for a first occurrence offense was a reasonable exercise of agency discretion. The only basis for the discipline selected is DEP Directive 435 which describes various offenses and the associated sliding scale of appropriate disciplinary action. (V2, p. 186-191). The disciplinary measures associated with a first occurrence of violation of computer security policy cover almost the entire gambit of available disciplinary measures.

The mere existence of a range indicates the exercise of discretion by the Agency. This discretion must not be unbridled. The Agency must prove "cause" for the discipline selected or action taken. Any other interpretation would vest unbridled discretion with a state agency in violation of the law. *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d 1189, 1191 (Fla. 1985). DEP failed to provide any basis for the discipline selected. DEP simply happened to select the most severe disciplinary measure in connection with a first and only violation of the Department's computer security policy by Mr. Bray. An offense consisting of eleven (11) items of non-work related material being present on Bray's state computer. Even under the most puritanical standard this violation cannot possibly warrant the most severe discipline available. The Agency presented no evidence why it should.

An Agency may select the most severe discipline under the its guidelines but does so under an obligation to prove "cause" sufficient to warrant the discipline selected. In the instant case, the unarguably minor violation of computer security policy by Mr. Bray cannot constitute "cause" for the maximum discipline dismissal.

The fact that PERC's mitigation authority has been stripped does not obviate the need for a finding of "cause" sufficient to warrant the discipline selected.

The Commission neatly side steps this issue by relying on Section 110.227(6)(c), F.S. which states that if the commission finds "cause" for the agency action, the commission shall affirm the decision of the agency head.

In the Commission's own words this section grants to the "... agency unfettered authority to impose the most severe penalty allowed by the law and its rules for any offense proven." (V2, p.253). Unfettered authority and unbridled discretion are identical twins, and both lead to violation of the separation of powers doctrine and right to due process.

An interpretation of Section 110.227(6)(c), F.S., that would grant "unfettered authority" to DEP when determining what discipline to match with an offense leads to arbitrary and capricious decisions.

At least this part of Section 110.227(6)(c), F.S. is clear, "cause" must exist for the agency action taken. The agency action in the instant case is dismissal. Therefore cause must exist for dismissal. Under a legitimate application of the agency rules and guidelines the agency must establish that cause existed for the action taken. It is not sufficient to simply stand back and allow the Agency to pick from the hat of available disciplinary measures on a case by case basis. Especially in a situation where the agency by its very rules has made the entire spectrum of disciplinary measures available to itself.

The Agency went gunning for Mr. Bray, confident that with a shotgun approach they could make something stick. The Agency brought four charges against Bray, sexual harassment, conduct unbecoming, insubordination and violation of computer security policy (the proverbial kitchen sink). The agency selected dismissal as the disciplinary action for each charge. The three most egregious and troubling charges, if proven, were dismissed. Unfortunately the remaining, and most innocuous, charge was proven. The agency presented no facts as to why dismissal was warranted for Bray's violation of computer security policy. The agency simply arbitrarily and capriciously selected dismissal from the unlimited range of (administrative) disciplinary measures available. The decision was arbitrary due to the unfettered authority and unbridled discretion the agency enjoys in selection of discipline. Likewise, the decision must be capricious, otherwise a more insidious and troubling intent could be imputed to the agency for its disciplinary selection. Is it possible that the Agency having committed hundreds of man hours and thousands of tax payer dollars to a misguided sexual harassment, insubordination and conduct unbecoming investigation and prosecution of Mr. Bray were not confident he would be dismissed based on these charges?

CONCLUSION

Historically, an agency has not been vested with the power to unilaterally decide the disciplinary fate of Career Service employees in its employ. The Amendments to Section 110.227, F.S. have changed this equation. The Amendments have created a privileged class within the Career Service system of employees who enjoy the benefits of mitigation, precedent and immunity from unbridled agency discretion. The disciplinary action taken against members of the privileged class may be mitigated in light of their disciplinary record and gravity of the misconduct. Unfortunately for Mr. Bray he is not a member of this privileged class and therefore not entitled to the same protections enjoyed by them. In addition to being unconstitutional, the Amendments to Section 110.227, F.S. impermissibly vest unbridled agency discretion with DEP which resulted in a violation of the Separation of Powers Doctrine and a denial of Mr. Bray's right to due process. Accordingly, Sections 110.227(6)(c) and (7) should be declared unconstitutional as applied, and the disciplinary action taken by the Agency against Mr. Bray determined to be arbitrary and capricious. Mr. Bray's case should be remanded to PERC for reconsideration in light of his tenure and lack of prior discipline in the same manner as his fellow employee members of the "privileged class."

Respectfully submitted,

____________________/S/
Richard A. Bray
1115 Domingo Drive
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three (3) copies of the foregoing Initial Brief of Appellant has been furnished by Hand-Delivery to the Clerk, First District Court of Appeal, Martin Luther King Boulevard, Tallahassee, Florida 32399 and a true and correct copy of the same to MARSHALL WISEHEART, Assistant General Counsel, Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399 and SHARON A. ZAHNER, Staff Counsel, Public Employee Relations Commission, 4050 Esplanade Way, Tallahassee, Florida 32399-0950, this 6th day of September, 2002.

Respectfully submitted,

/S/________________
Richard A. Bray
1115 Domingo Drive
Tallahassee, FL 32301
(850) 576-3897

APPENDIX B

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RICHARD A. BRAY,

Employee/Appellant,

FIRST DCA DOCKET
NO.: 1D02-2616
vs. PERC CASE NO.: CS-2002-074

PUBLIC EMPLOYEES RELATIONS
COMMISSION and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Agencies/Appellees

______________________________/

APPELLANT'S REPLY BRIEF

RICHARD A. BRAY
1115 Domingo Drive
Tallahassee, Florida 32304
850-576-3897
Appellant

PRELIMINARY STATEMENT

The following abbreviations and citations are used throughout this Initial Brief:

DEP or Department or Agency	Appellee, State of Florida Department of Environmental Protection
PERC	Appellee, Public Employees Relations Commission
(V__,p.___)	Citation to Record on Appeal V = Volume p. = Page

This Response by the Appellant addresses the arguments and statements made by counsel for the Appellee in their Answer Brief dated October 21, 2002, filed in response to the timely filing of a Notice of Administrative Appeal on June 27, 2002, by the Appellant herein.

APPELLANT'S RESPONSE TO THE APPELLEE'S STATEMENT OF THE CASE AND FACTS

Counsel for the Department insists on making a serious issue out of the harmless and commonplace scenario where an employee has non-work related files on their computer. For example, counsel (and PERC) states that a picture of nude men was found on Bray's computer. Upon examining this picture, it is clear that this is not a true statement as the men are covered by cowboy boots and hats. There is no genitalia showing nor are any sexual acts being committed in this, or any, of the images that were found on Bray's computer. The people in the humorous pictures found on Bray's computer are covered in some manner and are not completely nude as implied by counsel for the Department.

SUMMARY OF RESPONSE

By removing the protective process of mitigation from the majority of workers within the Career Service System but retaining and affording this protection to a newly-created privileged class of workers within the same system, the amendments to Section 110.227, Florida Statutes, violate the equal protection doctrine.

Appellee speculates as to the rationale behind the legislative adoption of the classification system, but provides no factual data to support its hypotheses. Pure speculation by the Appellee is insufficient to refute Mr. Bray's arguments and evidence clearly showing the lack of any rational basis for the creation of a privileged class within the Career Service System.

Moreover, Appellant adequately demonstrates that by removing the protective process of mitigation from the majority of workers, the amendments to the statute allow agencies unbridled discretion and undue authority when administering discipline to their employees in clear violation of the Separation of Powers Doctrine. Appellant uses his case to adequately demonstrate this point, Bray v. the Department of Environmental Protection, Case No. CS-2202-074, in which the Agency administered the most severe discipline available to it and dismissed the employee for a relatively minor first-time offense of having non-work related files on his computer.

Finally, it is a matter of judicial and public record that members of the privileged class have committed more serious offenses than Mr. Bray (even crimes) and had their dismissals mitigated.

APPELLEE'S ARGUMENT I.

I. SECTION 110.227, FLORIDA STATUTES, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE STREAMLINING THE DISCIPLINARY PROCESS FOR MOST CAREER SERVICE EMPLOYEES, BUT NOT ALL, HAS A RATIONAL BASIS.

APPELLANT'S RESPONSE TO ARGUMENT I.

A preliminary step in any equal protection analysis is the determination of whether the groups subject to different treatment are in fact similarly situated. Lisboa v. Dade County Property Appraiser, 705 So.2d 704 (Fla. 3d DCA 1998). Appellee claims that Bray fails even this threshold requirement since law enforcement workers, firefighters, and health care workers are in a different situation from other career service workers. Appellee then hypothesizes that members of the "privileged class" face more danger and are more essential in emergencies, and their positions may be more difficult to fill. Appellee provides no factual data to support its hypothesis that these positions may be more difficult to fill than any other positions within the Career Service System. The theory that members of the newly-created privileged class "face more danger" is seriously debatable. Certain members of the Career Service System who are not members of the privileged class face greater danger at times than their colleagues. However, Appellee fails to establish that the privileged class faces any more danger as a whole than the remainder of the Career Service System as a whole. Numerous fact based examples of dangers facing employees who are not members of the privileged class further serve to debunk Appellee's argument. Biologists and geologists in the Career Service System are not included in the newly-created privileged class. There are geologists with the Department who survey and map sinkholes. The job duties of these geologists require them to physically enter these unstable subsurface features, thus placing them in greater danger than the typical office worker in the career service system. Similarly, biologists with the Department often have to conduct work in the field such as tagging endangered species, wetland delineations, underwater seagrass surveys along the coast, etc. The job requirements of these biologists expose them to a hazardous working environment where they have an increased likelihood of encountering sharks, alligators, and venomous snakes, spiders, and insects, all of which kill many Floridians each year. Biologists face increased danger from drowning, lightning (Florida leads the world in lightning deaths and shark attacks), heat stroke, and sun exposure. As recently as 1998, a 24-year-old biologist with the Department became overwhelmed by heat exhaustion and collapsed and drowned as she was collecting water samples in the Everglades. These examples of the dangers that geologists and biologists face while doing their jobs with the Department further dispel Appellee's speculation that members of the newly-created privileged class "face more danger."

Appellee's contention that law enforcement, correctional, firefighter, and health care positions may be more difficult to fill is ridiculous. We are dealing with dismissal not a disparity in hiring standards. When an agency makes the decision to fire an employee it is obviously not concerned with its ability to fill the position, or else the agency would not be pushing for dismissal. In addition, this statement is also erroneous. Law enforcement workers, correctional officers, firefighters, and health care workers all require significantly less education and training than most of the professional positions at the Department. For example, a person seeking employment as a law enforcement officer can typically receive the highest degree of training and certification in less than two years time. However, a person seeking employment as a biologist must have the minimal training of at least four years of college. Exact figures are not known, but it is safe to conclude that there are many more individuals qualified to serve as law enforcement officers than there are qualified college-educated biologists.

The Appellee takes considerable liberty (contrary to the rules of statutory interpretation) in attempting to concoct a rational legislative basis behind the plain language of the amendments to Section 110.227, F.S. Appellee is unable to create a rational basis for the amendment two (2) years after its adoption. Historically, all career service employees were provided equal protection against disparate treatment and excessive discipline through the mitigation process of PERC.

Under the recently amended statute (Section 110.227, F.S.), the protective process of mitigation was removed for the majority of career service employees, while the newly-created privileged class (law enforcement, correctional officers, firefighters, and health care providers) retained the right to use this protective process.

What the legislature and the Governor were trying to do was rational and honorable, however, they went about "streamlining" the career service system the wrong way. The legislature's own staff recognize this in their analysis of the statutory amendments to Section 110.227, F.S., when it was just a bill. Specifically, they conclude that, "the new law may be challenged on equal protection grounds in that it may result in similarly situated state employees being treated differently with regard to discipline." See Senate Staff Analysis CS/SB466, pp. 15-16, attached as Appendix "1." The state is under obligation to afford all persons equal protection of the law. Zapo v.Gilbreath, 779 So.2d 651, 655 (Fla. 5th DCA 2001). When the statute was amended to remove the right of the majority of career service employees to be protected against excessive discipline, while assuring this protection for a select group of workers through the mitigation process, the statute created a privileged class of workers within the Career Service System. This privileged class now has more protection from excessive discipline than the majority of workers within the same system. This unlawful segregation of Career Service employees has resulted in a violation of Mr. Bray's right to equal protection.

APPELLEE'S ARGUMENT II.

II. SECTION 110.227, FLORIDA STATUTES, DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

APPELLANT'S RESPONSE TO ARGUMENT II.

The Appellant's own case can be used to demonstrate that the recently amended statute does violate the separation of powers doctrine. PERC dismissed the three most egregious charges filed against Bray after Appellee suspiciously abandoned the charge of sexual harassment at hearing. It was the charge of sexual harassment that initiated the full-blown investigation of Bray which, in turn, resulted in the non-work related files being discovered on his computer. As a result, Appellee charged Bray with a violation of the Department's Computer Security Policy and terminated him.

There is a range of disciplinary action that an agency may administer for specified offenses. The mere existence of a range indicates discretion. This discretion must not be unbridled. The Agency must prove "cause" for the discipline of any action taken. The discipline selected must be compatible with the severity of the offense and the number of times it has been committed by the offender. Allowing an agency to utilize a wide range of disciplinary measures without the constraint of matching the offense with the punishment vests unbridled discretion in the Agency and results in disparate treatment among similarly situated employees.

Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985). In Bray's case, Appellee failed to prove "cause" for the extreme discipline selected. Appellee chose the most severe discipline for a first-time minor offense by Bray of having non-work related files on his computer.

An Agency may select tority to impose the most severe penalty allowed by the law and its rules for any offense proven." (V2, p.253). Unfettered authority and unbridled discretion are synonymous, and both lead to violation of the separation of powers doctrine in the instant case.

APPELLEE'S ARGUMENT III.

III. SECTION 110.227, FLORIDA STATUTES, DOES NOT VIOLATE DUE PROCESS.

APPELLANT'S RESPONSE TO ARGUMENT III.

Appellee completely avoids the core of Appellant's due process argument. Appellant does not contend that Section 110.227, F.S. is ambiguous. Appellant argues that the due process violations occur as a result of PERC being denied the ability to consider prior cases and other sets of facts as part of the Appellant PERC appeal. Understandably, this issue is avoided by the Appellee. What possible rationale exists to deny Mr. Bray the benefit of *stare decisis.*

APPELLEE'S ARGUMENT IV.

IV. APPELLANT'S ARGUMENT IS UNPERSUASIVE AS APPLIED TO THE FACTS.

APPELLANT'S RESPONSE TO ARGUMENT IV.

Contrary to the Appellee's opinion, Appellant has shown that a member of the privileged class would have been treated differently than he under the same scenario. This showing was demonstrated by the example given in pages 24-25 of the Initial Brief of Appellant.

In addition, recent cases before PERC prove that members of the newly-created privileged class have been treated differently than Appellant. Recently, numerous members of the privileged class with good employment records and lengthy tenure similar to that of Bray have appealed their cases to PERC, their dismissals were overturned and they received less severe disciplines through the mitigation process. Capers v. Department of Corrections, 17 FCSR 249, (2002).

In the case of Sanders v. Department of Corrections, 16 FCSR 495 (2001), for example, Mr. Sanders, a Probation Officer, was dismissed for giving beer to a visitor of a probationer that he was supervising. Sanders was suspended for 3 days in 1990 for another offense he committed. Sanders appealed his dismissal and the dismissal was mitigated by PERC which imposed a sixty-day suspension. Sanders got his job back with back pay and benefits despite a prior disciplinary record and even though he committed a much more egregious offense than Bray. See, Rector v. Department of Corrections, 16 FCSR 515 (2001). In the Rector case, Rector admitted to pushing a coworker and pled guilty to a misdemeanor charge of battery. Although Rector was initially dismissed, she was reinstated with back pay and benefits, thanks to PERC and the mitigation process.

By reviewing actual PERC decisions and seeing how they are interpreting and implementing the recent amendments to the statute, it is obvious that if Bray was a member of the newly-created privileged class that he would have been entitled to mitigation of the disciplinary action taken against him after consideration of his exemplary employment record and minor nature of his offense. However, since Bray is not a member of the privileged class, he is not entitled to protection against excessive discipline, unbridled agency discretion, or disparate treatment through the mitigation process that has been historically available to all workers within the Career Service System. Bray's dismissal was upheld while members of the newly-created privileged class who commit more serious offenses and who have prior records of discipline are being reinstated with back pay and benefits. There are even cases of members of the privileged class committing crimes and getting their jobs back through the protective mitigation process! Clearly, Bray should be entitled to mitigation.

Respectfully submitted,

/S/

Richard A. Bray

1115 Domingo Drive
Tallahassee, Florida 32304
(850) 576-3897
Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has furnished by United States Mail to MARSHALL WISEHEART, Office of General Counsel, Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000 and SHARON A ZAHNER, Staff Counsel, Public Employees Relations Commission, 4050 Esplanade Way, Tallahassee, Florida 32399–0950, this 6th day of November, 2002.

/S/
RICHARD A. BRAY

CERTIFICATE OF COMPLIANCE

I, RICHARD A. BRAY, hereby certify that my Reply Brief complies with the font requirements set forth in Rule 9.210(a)(2), Fla. R. App. P.

/S/
RICHARD A. BRAY

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

February 21, 2003

CASE NO.:1D02-2616
L.T. No: CS-2002-074

Richard A. Bray	v.	Public Employees Relations Commission Etal
Appellant/Petitioner(s),	Appellee/Respondent(s).	

BY ORDER OF THE COURT:

Appellant's motion for oral argument filed September 6, 2002, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Richard A. Bray
Marshall G. Wiseheart, A.G.C.
Sharon A. Zahner

Sj

________________________/S/
JON S. WHEELER, CLERK

APPENDIX D

IN THE DISTRICT COURT
OF APPEAL FIRST
DISTRICT, STATE OF
FLORIDA

RICHARD A. BRAY

Appellant,

v.

NOT FINAL UNTIL TIME
EXPIRES TO FILE
MOTION FOR
REHEARING AND
DEPOSITION THEREOF IF
FILED
CASE NO. 1D02-2616

PUBLIC EMPLOYEES
RELATIONS COMMISSION
And DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellees.
_______________________________________/

Opinion filed June 23, 2003.

An appeal from an order of the Public Employees Relations Commission.

Appellant, Pro se.

Marshall G. Wiseheart, Assistant General Counsel, Department of Environmental Protection, Tallahassee; Sharon A. Zahner, Public Employee Relations Commission, Tallahassee, for Appellees.

PER CURIAM.

AFFIRMED.

BOOTH, BENTON and POLSTON, JJ., CONCUR.

APPENDIX E

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RICHARD A. BRAY,

Employee / Appellant,

vs. FIRST DCA DOCKET NO. 1D02-2616
PERC CASE NO.: CS-2002-074

PUBLIC EMPLOYEES RELATIONS
COMMISSION and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Agencies / Appellees
_______________________________________/

MOTION FOR CLARIFICATION, CERTIFICATION AND REQUEST FOR WRITTEN OPINION

COMES NOW, Appellant, RICHARD A. BRAY, and does hereby request this Court clarify its Opinion affirming an order of the Public Employees Relations Commission filed on June 23, 2003, certify the issues raised in Appellant's Initial Brief to the Supreme Court as matters of great public importance and request a written opinion from the Court, and in support thereof states as follow:

1. This Motion for Clarification, Certification and Request for Written Opinion is sought pursuant to Rule 9.330, Florida Rules of Appellate Procedure.

2. The Opinion of this Court affirming, *Per Curiam* the Order entered by the Public Employees Relations Commission fails to set forth any basis for the decision, line of cases supporting the decision or in any way explain the rationale for the Opinion reached by this Court.

3. Appellant filed an Initial Brief on September 6, 2002 along with a request for Oral Argument. Appellee's fourteen (14) page Answer Brief was filed on October 21, 2002. On November 8, 2002 the Appellant filed his Reply Brief.

4. On February 23, 2003, Appellant's Request for Oral Argument was denied by the Court. The Appellant understands the discretionary nature of oral argument and although an opportunity to present my case to the Court would have been welcomed, I understand the need for judicial economy. The presumption being that the Court did not feel that consideration of the issues raised by the parties would be enhanced through oral argument before the Court.

5. The decision entered by the Court on June 23, 2003, contained no written basis for the decision. Appellant requests that the Court clarify its decision through the issuance of a written opinion. Appellant believes that a written opinion would provide a legitimate basis for Supreme Court review and humbly

requests that the instant Court issue a written opinion documenting the basis for its decision.

6. The equal protection and agency discretion issues raised in the instant case have ramifications for tens of thousands of state career service employees. Although the damage has already been done in my case, this Court and the Supreme Court are in a unique position to prevent future unequal treatment of career service employees and unbridled agency discretion in its treatment of career service employees.

7. As noted in Appellant's Reply Brief, the equal protection implications of the "Service First" amendments to Section 110.227, Florida Statutes, were noted by the very legislative staff performing analysis of the amendments. Legislative staff concluded that "the new law may be challenged on equal protection grounds in that it may result in similarly situated employees being treated differently with regard to discipline." See, Senate Staff Analysis CS/SB 466, pp. 15-16, attached as Appendix "1" to Appellant's Reply Brief. Such a challenge on equal protection grounds was not ripe at the time the amendments became law in 2001.

8. Appellant's challenge on equal protection grounds as a result of a state agency's dissimilar treatment of Appellant as opposed to similarly situated employees is undoubtedly ripe for a decision from this Court and, if necessary, a ruling by the Supreme Court.

9. The road to this point has been emotionally and financially difficult. Nonetheless, with the exception of the issues raised on appeal to this

Court, the Administrative and Circuit Court processes have blindly served the interest of justice. I realize issues presented to the Court are complex and understand the restrictions precedent places on the Court during the decision-making process.

10. I reiterate that considerable damage has been unjustifiably done to me and my career. My only hope is that through my continued efforts to right the wrong that has occurred by amending Section 110.227, Florida Statutes, that future pain and suffering can be prevented for other state employees who have had their rights protecting them from unbridled agency discretion and unequal treatment stripped from them. To reach the end of my journey, I will need a written opinion from this Court. A written opinion would also allow me to determine whether I have fulfilled my promise to myself and similarly situated state employees of following this matter to its end regardless of the hardship or outcome. I was raised to believe that Justice is blind but she is never mute.

11. In short, it is my belief, based upon case law, legislative analysis and the facts of the instant case that a written opinion from this Court setting forth the basis for affirmance of the Public Employees Relations Commission Order will provide a legitimate basis for Supreme Court review.

12. Accordingly, I would respectfully request that this Court certify the following issue to the Supreme Court as a matter of great public importance:

Does Section 110.227, Florida Statutes,

> create a legislative classification and distinction among similarly situated employees of the Career Service System that violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America and the promise of Article I, Section 2 of the Florida Constitution that all persons are equal before the law.

WHEREFORE, Appellant, Richard A. Bray, moves this Court for Clarification in the form of a written opinion on its decision to affirm the Public Employees Relations Commission Order in this matter and requests that the Court certify the equal protection issue raised by Appellant to the Supreme Court.

I HEREBY CERTIFY that the original and one (1) copy of the foregoing Motion for Clarification has been furnished by Hand-Delivery to the Clerk, First District Court of Appeal, Martin Luther King Boulevard, Tallahassee, Florida 32399 and a true and correct copy of the same by United States Mail to MARSHALL WISEHEART, Assistant General Counsel, Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399 and SHARON A. ZAHNER, Staff Counsel, Public Employee Relations Commission, 4050 Esplanade Way, Tallahassee, Florida 32399-0950, this 8th day of July, 2003.

/S/____________________
RICHARD A. BRAY
1115 Domingo Drive
Tallahassee, Florida 32304
850-576-3897

APPENDIX F

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

August 14, 2003

CASE NO.:1D02-2616
L.T. No: CS-2002-074

Richard A. Bray	v.	Public Employees Relations Commission Etal
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed July 8, 2003 for clarification, certification and request for written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Richard A. Bray
Marshall G. Wiseheart, A.G.C.

Sharon A. Zahner

jm

_________________________/S/
JON S. WHEELER, CLERK

APPENDIX G

SUPREME COURT OF FLORIDA
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

Thomas D. Hall
Clerk
Debbie Causseaux
Chief Deputy Clerk
Porsche Shantz
Staff Attorney

Phone number (850) 488-0125
www.flcourts.org/clerk/html

ACKNOWLEDGMENT OF NEW CASE

August 29, 2003

RE: RICHARD A. BRAY vs. PUBLIC EMPLOYEES
RELATIONS
COMMISSION, ET AL.

CASE NUMBER: SC03-1512
Lower Tribunal Case Number: 1D02-2616
Lower Tribunal Filing Date: 8/27/03

The Florida Supreme Court has received the following documents reflecting a filing date of 8/28/2003.

Notice to Invoke Discretionary Jurisdiction

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts, if any, enclosed with this acknowledgment.

Oh

cc:
HON. JON S. WHEELER, CLERK
RICHARD A. BRAY
MARSHALL WISEHEART
SHARON A. ZAHNER

APPENDIX H

SUPREME COURT OF FLORIDA

FRIDAY, AUGUST 29, 2003

CASE NUMBER: SC03-1512
Lower Tribunal No:1D02-2616

RICHARD A. BRAY	vs. PUBLIC EMPLOYEES RELATIONS COMMISSION, ET AL.
Petitioner(s)	Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
Test:

_______________________/S/
Thomas D. Hall
Clerk, Supreme Court
oh

Served:
HON. JON S. WHEELER, CLERK

RICHARD A. BRAY
MARSHALL WISEHEART
SHARON A. ZAHNER

APPENDIX I

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 466

SPONSOR: Governmental Oversight and Productivity Committee and Senator Garcia

SUBJECT: Public Employment

DATE: April 10, 2001
Revised: 4/13/01

Analyst	Staff Director	Reference	Action
1. White/Wilson	Wilson	GO	Favorable/CS
2.		AGG	Withdrawn
3.		AP	
4.			
5.			
6.			

I. Summary:

This bill substantially revises the employment, recruitment, training and discipline standards for career employees of the State of Florida agencies. Its major provisions increase the number of exempt positions not subject to career protections, change from just cause to reasonable cause the disciplinary standard for employees conduct violations, and reduce the steps involved in the processing of disciplinary appeals through the Public Employees Relations Commission.

This bill substantially amends ss. 20.23, 110.1091, 110.1095, 110.1099, 110.1127, 110.113, 110.1245, 110.131, 110.205, 110.211, 110.213, 110.219, 110.224, 110.227, 110.233, 110.235, 110.401, 110.403, 110.601, 110.602, 110.605, 110.606, 288.708, 440.4416, 509.036, 216.262, 447.201, 447.205, 447.207, 447.503, 447.507, 112.215, 447.403, and 216.163, Florida Statutes.

This bill repeals ss. 110.108, 110.109, 110.1246, 110.207, 110.209, 125.0108(2)(d), 945.35(3)(c), and 985.4045(1)(b), Florida Statutes.

This bill creates ss. 110.2035 and 110.1315 of the Florida Statutes.

II. Present Situation:

Chapter 110, Florida Statutes – State Employment: Chapter 110, F.S., is divided into five parts. Part I contains general state employment provisions; Part II addresses the Career Service System; Part III deals with the Senior Management Service System (SMS); Part IV relates to Volunteers; and Part V establishes the Selected Exempt Service System (SES).

Part I of ch. 110, F.S., covers such areas as education and training opportunities for state employees; personnel pilot projects; productivity improvement and personnel audits of executive branch agencies; use of telephone voice mail systems; employee security checks; employee wage deductions; paid holidays; sick leave pool; terminal pay for accumulated sick leave; sexual harassment policy; employee long-term-care plan; state group insurance program; prescription drug program; health insurance; meritorious service awards program; termination or transfer of employees aged 65 years or older, state officers' and employees' child care services; other-personal-services (OPS) temporary employment; adoption benefits; pretax benefits program; the Florida State Employees' Charitable Campaign contribution program; and state employee leasing.

Part II of ch. 110, F.S. establishes the Career Service System,[1] and requires the Department of

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[1] In 1999, the State Personnel System consisted of 124,160 employee positions, 119,878 of which were career service employee positions (45 percent male, average salary $33,326; 55 percent female, average salary $28,351). Annual Workforce Report, the Department of Management Services, at 3 and 11 (1999).

Management Services (DMS) to develop and maintain uniform classification and equitable pay plan applicable to all positions in the career service; to determine guidelines for employee recruitment and selection to be used by employing agencies; to adopt rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees; and to develop uniform rules, in consultation with affected agencies and pursuant to the approval of the Administration Commission, regarding employee appointment, promotion, demotion, reassignment, separation, status, attendance, and leave.[2] [3]

The terms "career service" and "career service employee" are not defined in the statutes.[4] A "career service employee" may be a short-term or long-term employee. The rules distinguish among probationary, overlap, temporary, trainee, and permanent status. The rules further provide that an employee "who has been appointed in accordance with this Chapter and granted probationary status will attain permanent status in a class upon successful completion of the designated probationary period for the class." The statutes provide that an employee classified as a "permanent career service employee" may only be suspended or dismissed for cause. Cause includes negligence, inefficiency or inability to perform assigned duties, insubordination, willful violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug use, or conviction of any crime involving moral turpitude.

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[2] The DMS has adopted rules to implement the requirements of Part II, which can be found in Chapters 60K and 60L of the Florida Administrative Code.

[3] Sections 110.207, 110.209, 110.211, 110.213, and 110.217, F.S.

[4] The rules, however, define "career service" as: "All state authorized and established positions not exempted by Section 110.205, F.S." Rule 60K-14.001(9), F.A.C.

Part III of ch. 110, F.S., establishes the SMS,[5] which is a separate system of personnel administration for positions in the executive branch, the duties and responsibilities of which are primarily and essentially policymaking or managerial in nature. The DMS is charged with adopting rules that provide for a system for employing, promoting, or reassigning managers that is responsive to organizational or program needs. Employees in SMS serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotions, transfer, or other personnel action at the discretion of the agency head. The number of positions included in SMS cannot exceed .5 percent of the total full-time equivalent positions in the career service.

Part IV of ch. 110, F.S., addresses volunteers by setting forth the responsibilities of departments and agencies utilizing volunteers. Volunteers recruited, trained, or accepted by any state department or agency are not subject to any provisions of law relating to state employment nor to any collective bargaining agreement between the state and any employees' association or union.

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[5] Of the 124,160 State Personnel System employee positions, 536 are SMS positions (68.9 percent male, average salary $90,914; 31.5 percent female $85,289). Annual Workforce Report, the Department of Management Services, at 3 and 13 (1999).

Finally, Part V of ch. 110, F.S., creates the SES.[6] The SES is a separate system of personnel administration that includes those positions that are exempt from the Career Service System. The DMS is required to designate all positions included in the SES as managerial/policymaking, professional, or nonmanagerial/nonpolicymaking. The number of positions included in SES, excluding those positions designated as professional or nonmanagerial/nonpolicymaking, cannot exceed 1.5 percent of the total fulltime equivalent positions in the career service. Employees in SES serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action at the discretion of the agency head.

Florida's Career Service System: Florida's Career Service System, as found in Ch. 110, F.S., has been in place since 1979, and has been amended several times during the course of its existence. Recently, the system has been criticized.

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[6] Of the 124,160 State Personnel System positions, 3,746 are SES positions (61.1 percent male, average salary $67,124; 38.9 percent female, average salary $57,469). Annual Workforce Report, the Department of Management Services, at 3 and 12 (1999).

Florida Tax Watch has worked for a number of years in a bi-partisan effort to modernize the Career Service System. In 1986, Florida Tax Watch recommended legislation to create a performance-based compensation and personnel system coupled with increased public management authority and accountability. Florida Tax Watch has indicated that:

> A thorough, major overhaul of Florida's Career Service is required if Florida is to keep pace with productivity in the private sector. This requires:
>
> ⇒ Meaningful management and supervisory authority and accountability for public service results and unit costs.
> ⇒ An inviting, challenging workplace and culture that provides employees with opportunities for career growth and mobility.
> ⇒ Compensation that is competitive with the private sector for recruitment/retention/promotion purposes.
> ⇒ Compensation/career advancement tied to the application of good performance measures and outcome performance (individuals and groups).
> ⇒ An ability by managers to reward meritorious performance by employees

and to sanction unacceptable, under-performance.

⇒ A flexible compensation benefits system (defined contribution retirement option).[7]

In 1991, the Commission for Government by the People (Commission), created by then, Governor Chiles, reported that Florida's Career Service System, like many other civil service systems, has become a "straight jacket" on managers. The Commission further stated that the career service system was designed for an "Industrial Era government of clerks and manual laborers; it long ago became obsolete. Its job classification system is too rigid; its pay system does not reward high performers; and its 'bumping' system during layoffs makes it difficult to slim down state government without virtually destroying it . . .[W]e urge the Legislature to . . . create an entirely new personnel system to replace Career Service."[8]

One of the most vocal critics of the Career Service System is the Florida Council of 100 (council).[9] The council, in its report entitled

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[7] "Modernizing Florida's Civil Service: A Necessary Beginning for Meaningful Change," Florida Tax Watch, Briefings, December 2000, at 1.

[8] "Government by the People: A Prescription for Florida's Future," The Report of Governor's Commission for Government by the People, Volume 1991.

[9] The Florida Council of 100 was formed in 1961 at the request of Governor Farris Bryant. It is a private, non-profit, non-partisan association whose members represent a cross-section of key

"Modernizing Florida's Civil Service System: Moving from Protection to Performance," November 2000, identified numerous problems with state government, including "slower implementation of technology, lack of long-term planning, inefficient use of capital, insufficient flexibility for managers, improper budget incentives, and even at times 'over-management' by past legislatures." More particularly, the council found that chief among the constraints to effective and efficient government performance is the state's Career Service System as found in ch. 110, F.S. and Chapter 60K, F.A.C. "The system makes managing human resources cumbersome, is de-motivating for managers, and damages the reputation of all state employees." In addition, the council enumerates four ways the current career service employment practices damage productivity:

1. Terms of employment constrain hiring and firing . . . In the private sector, employees can be hired and dismissed "at will" – within the bounds of numerous statutory guidelines designed to ensure fairness and the absence of discrimination.
2. Seniority as the principal retention criterion sacrifices performance . . . This

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business leaders in Florida. The Civil Service Reform Task Force was established in 1999 to review Florida's human resources management system and to propose improvements. "Modernizing Florida's Civil Service System, Moving from Protection to Performance," A Report from the Florida Council of 100, November 2000, at 2.

use of seniority creates the grounds for the practice of "bumping," in which a longer-tenured employee whose position has been eliminated can take the job of a more recently hired employee occupying an equivalent or lower title in the same job classification . . . The bumped employee may be out of work, regardless of performance – unless s/he has "permanent" status, in which case s/he can bump someone else in turn, propagating the disruption and lowering productivity further.

3. Compensation system does not adequately differentiate employees by performance . . . In Florida's state government, legislative allegations dictate how employees will receive compensation. In most years - though not all –Career Service employees receive an across-the-board salary adjustment . . . The across-the board adjustment as a management tool has the effect of rewarding under-performing workers and neglecting the high-performing ones.
4. Tight control of daily activities inhibits responsiveness and problem solving . . . [H]aving to abide by cumbersome, work-increasing rules deadens personal initiative and cooperation and fosters an attitude of indifference among employees.

In his "Recommended Budget" for the State of Florida for the fiscal year ending June 30, 2002, Governor Jeb Bush suggested changes to the Career Service System. The electronic version of the budget recommendations highlighted the Governor's priorities as: a smaller, more efficient government with a reduced infrastructure which does more with less; performance pay; the implementation of portable retirement plans; a reduction in the number of boards, councils and commissions; consolidation of multiple information technology operations into an enterprise organization; and pursuit of purchasing, facility and travel economies which produce values and avoid expense. The cumulative effect of these multiple undertakings produced a need for 4,226 fewer positions to achieve the same level of work.

The Public Employees Relations Commission: The Public Employees Relations Commission (PERC) was established in 1974 to provide statutory implementation of Art. I, s.6 of the Florida Constitution (the right of public employees to collectively bargaining).[10] The PERC is currently composed of a chair and two full-time commissioners appointed by the

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[10] The PERC handles public sector cases (unfair labor practice charges, representation petitions, amendments to certification, petitions to revoke certifications, and labor organizations registration), career service appeals, Drug-Free Workplace appeals, Whistle-blower appeals, veterans' preference appeals, attorney's fees appeals, back pay appeals, elections, mediation, and district court appeals.

Governor and confirmed by the Senate.[11] The PERC is housed within the Department of Labor and Employment Security[12] for administrative purposes, but is not subject to control, supervision, or direction by the department.[13]

The PERC decides cases sitting as a quasi-judicial collegial body and issues final orders.[14] Any appeal of a PERC final order is taken to the District Court of Appeals.[15] In addition to hearing cases, PERC is required to determine questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit; determine or approve units appropriate for purposes of collective bargaining;[16] conduct secret ballot election to determine whether public employees desire to be represented by a union; process charges of unfair labor practices[17] as well as charges relating to a public employee or employee organization participating in a strike[18] and provide appropriate remedies; assign mediators to assist parties in negotiations when collective bargaining impasse occurs; and administer the impasse resolution process.[19]

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[11] For fiscal year 2000-2001 forty full time equivalent (FTE) positions were assigned to PERC with a Salaries and Benefits expense of $2,658,253.

[12] The restructuring of the services provided by the Department of Labor and Employment Security was initiated by the Workforce Florida Act of 1996. Ch. 96-404, L.O.F. Thereafter, ch.2000-165, L.O.F., provided legislative intent for the transfer of programs and workforce development from the Department of Labor and Employment Security to the Agency for Workforce Innovation.

[13] Section 447.205, F.S.

[14] PERC hears cases and issues final orders regarding, for example, the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of career service employees. Section 110.227, F.S.

[15] Section 447.504, F.S.

[16] There are currently 10 collective bargaining units: Administrative/Clerical, Operational Services, Professional, Professional Health Care, Law Enforcement, Security Services, Special Agent, Selected Exempt Physicians, and Supervisory. Annual Workforce Report – 1999, Department of Management Services, at 37.

In 1986, the Legislature abolished the Career Service Commission and transferred its jurisdiction to PERC.[20] This jurisdiction provides implementation of Art. II, s. 14 of the Florida Constitution (providing a civil service system for state employees). In 1987, the Legislature expanded PERC's jurisdiction over Veteran's Preference Appeals, and in 1988, PERC was assigned jurisdiction over appeals arising under the "Drug-Free Workplace" Act.

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[17] Unfair labor practices, on the part of the employer, include encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment; refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement; and refusing to discuss grievances in good faith. Unfair labor practices, on the part of the public employee organization, include causing or attempting to cause a public employer to discriminate against an employee because of the employee's membership or nonmembership in an employee organization; and refusing to bargain collectively or failing to bargain collectively in good faith; and, participating in a strike. Section 447.501, F.S.

[18] Section 447.505, F.S., prohibits strikes by employees and employee organizations. Such strikes are also prohibited by s. 6, Art. I of the State Constitution.

[19] Section 447.207, F.S.

[20] *See* Senate Staff Analysis and Economic Impact Statement, CS/SB 1694, March 19, 1991, at 1.

According to statistics accumulated by PERC for the Fiscal Year 1999-2000, PERC made 1,368 "final order decisions".[21]

In the decade of the 1970s that system came to be located in a Department of Administration, the forerunner of the current Department of Management Services. It was amended further in 1974 to recognize the addition of collective bargaining for public employees and to provide a dispute resolution and union certifying body, the Public Employees Relations Commission. In the following decade the system was divided into three components with the addition of a new Senior Management Service and Selected Exempt Service. Only the addition of larger numbers of exempt positions and collective bargaining units and a personnel pilot project in the Department of Transportation have materially changed the system from that time until the present.

III. Effect of Proposed Changes:

Note: Sections 3,6, 10, 12, 22, 23, 24, 27, 29, 30, 35, and 38 of the bill make technical changes.

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[21] According to the DMS, the latest available data is for fiscal year 1998-99, and is as follows: 1251 career service employees were dismissed (320 appealed to PERC), 1922 were demoted (21 appealed to PERC), 1094 laid off (97 appealed to PERC), and 58 abandoned their positions (0 appeals). Annual Workforce Report – 1999, Department of Management Services, at 32.

Section 1. Deletes existing language in s. 20.055(3)(h)1., F.S., which provided that the position of Inspector General for the Department of Transportation shall be in the Career Service System.

Section 2. Repeals s. 110.108, F.S., that authorizes agencies to develop pilot personnel plans that try different approaches to current personnel procedures. Repeals s. 110.109, F.S., that authorizes the DMS to audit state agency personnel systems.

Section 4. Repeals s. 110.1095, F.S., which requires the DMS to establish a basic supervisory skills training program for executive branch supervisors.

Section 5. Amends s. 110.1099, F.S., which permits state employees to attend public universities using tuition waivers or vouchers for work-related courses. The bill makes technical drafting changes and adds that state employees may also attend community colleges.

Section 7. Amends s. 110.113, F.S., which requires state employees appointed after July 1, 1996, to participate in the direct deposit program, except that other-personal-service employees and employees, who demonstrate a hardship, may request an exemption. The bill deletes reference to July 1, 1996; thereby, requiring all state employees to participate in the direct deposit program.

Section 8. Amends s. 110.1245, F.S., which provides for the meritorious service awards program that is to be developed by the DMS for employees who propose ideas that increase productivity, eliminate or reduce state expenditures, or generate revenue. The agencies set the award amounts, which are capped under the section. This section also provides that agency heads purchase a token of recognition that costs up to $100 for a retiring employee or for an appointed member of a state board or commission, and may expend up to $50 for a state employee who has achieved an increment of 5 years service.

The bill amends this section to replace the "meritorious service awards" program with a new "savings sharing" program. Under the bill, the DMS is directed to develop procedures for the savings sharing program, which applies to individuals or groups of employees in the Career Service System, Selected Exempt Service, or judicial branch, when these individuals propose procedures or ideas that are adopted and which result in eliminating or reducing state expenditures. Agency heads are directed to recommend monetary awards for such employees. The awards must be directly related to the cost savings realized and must be approved by the Legislative Budgeting Commission. Agencies are required to annually report their level of participation in the savings sharing program to the Legislature.

The bill also provides for lump-sum bonuses to be paid from funds appropriated by the Legislature for bonuses from unused salary and expense dollars to state employees under certain circumstances. Under the bill, the agency must submit a plan to award lump-sum bonuses to the Office of Policy and Budget (OPB) in the Executive Office of the Governor (EOG) by September 15th of each year. The plan must contain bonus criteria that includes, but is not limited to, requiring that the employee: (a) have been employed prior to July 1 of that fiscal year, but not have been on leave without pay for more than six months, nor have been disciplined during that year; (b) have demonstrated a commitment to the agency mission by reducing the burden on those served, improving the way business is conducted, producing results in the form of increased outputs, and working the improve processes; (c) have demonstrated initiative in work and exceeded normal job expectations; and (d) have modeled the way for others by displaying agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork. Additionally, the plan must include: (a) a periodic evaluation of the employee's performance; (b) peer input to account for at least 40 percent of the bonus award determination; (c) a division of the agency by work unit for purposes of peer input and bonus distribution; and (d) a limitation on bonus distribution equal to 35 percent of the agency's total authorized positions, unless this limitation is waived by the OPB upon a showing of exceptional circumstances.

Finally, the bill increases the amount an agency head may spend for a token of a recognition for a state employee who has achieved an increment of 5 years service from $50 to $100.

Section 9. Repeals 110.1246, F.S., which permits the DMS to establish by rule authorization for agency heads to award lump-sum bonuses.

Section 11. Amends s. 110.131, F.S., which provides for other-personal-services (OPS) temporary employment. Agencies may employ an OPS worker for up to 1,040 hours in any 12-month period.[22] An extension requires agency head approval. The time limitation does not apply to board members, consultants, seasonal employees, institutional clients employed as a part of their rehabilitation, or degree-seeking students.

The bill amends this section, effective July 1, 2001, to require EOG approval for extensions of OPS employment beyond 1,040 hours. The bill adds that employees hired to deal with emergency situations that effect the health, safety, and welfare of state citizens, or hired for a project that is identified by a specific appropriation or time-limited grant are not subject to the 1,040 hour limitation.

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[22] There was an average of 12,292 OPS employees per month during Fiscal Year 1998-1999.

Section 13. Amends s. 110.203, F.S., which provides definitions for various terms used in the statutes with regard to the Career Service System. Effective July 1, 2001, the definitions of "dismissal" and "suspension" are amended to refer to the new standard of "reasonable cause." The definition of "layoff", is also amended to add that a termination of employment due to a material change in the duties or organization of an agency includes "the outsourcing or privatization of an activity or function previously performed by career service employees." The bill also adds the following new definitions: (a) "firefighter" means a firefighter certified under ch. 633, F.S.; and (b) "law enforcement or correctional officer" means a law enforcement officer, special agent, correctional officer, correctional probation officer, or institutional security specialist required to be certified under chapter 943, F.S.

Section 14. Creates s. 110.2035, F.S., to develop a new civil service classification and compensation program. Currently, there are six separate personnel structures: the State Personnel System (Career Service, Selected Exempt Service, Senior Management Service);[23] Legislature; Lottery; State University System;

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[23] There are approximately 124,160 employee positions within the State Personnel System, which includes 119,878 Career Service employee positions, 3,746 Selected Exempt employee positions, and 536 Senior Management employee positions.

Judicial; Auditor General; and other miscellaneous executive pay plans. Within the Career Service System there are 1,346 classes, 50 occupational groups, and, as of 1997, 86 different pay ranges. In many classes, there is little distinction between duties and responsibilities. Minimum qualification requirements are often based on years of experience, which may not be a good indicator of whether an employee can successfully do the job. The DMS has indicated that the pay grade minimums are too low to attract and maintain well-qualified candidates, and that the actual pay grades have little distinction between them, making it difficult to distinguish between the value of the different jobs.

The new section created by the bill directs the DMS, in consultation with the EOG and Legislature, to develop a model civil service classification and compensation program, which includes a reduced position classification system, that is no more than 50 occupational groups and up to a six-class structure for each occupation within an occupational group, and a pay plan that provides broad, market-based salary ranges for each occupational group. The bill sets forth various goals to be considered in designing and implementing the model program, which include: (a) reducing the need to reclassify positions; (b) emphasizing pay administration and job performance evaluation by management, rather than use of the classification system to award salary increases; and (c) increasing managerial flexibility in moving employees through pay ranges and in awarding salary increase additives and lump-sum bonuses.

This bill requires the DMS to submit the proposed model civil service classification and compensation program to the EOG, the presiding officers of the Legislature, and the appropriate legislative fiscal and substantive standing committees, on or before December 1, 2001.

Section 15. Amends s. 110,205(2), F.S., which enumerates the positions that are exempted from the career service, and provides that no position may be exempted if it reports to a position in the career service. Under the bill, the prohibition on exempting positions that report to a career service supervisor is deleted. Furthermore, the bill transfers specified managerial, confidential and supervisory employees from the Career Service to the Selected Exempt Service, and provides that employees may be exempted and moved to the Selected Exempt Service by way of an agreed upon collective bargaining agreement. The bill states that all annual, sick, and compensatory leave transfer with any employee transferred into the Selected Exempt Service.

Section 16. Repeals s. 110.207, F.S., which authorizes the structure of the current state personnel system, and repeals s. 110.209, F.S., which authorizes the current state employee pay plan. The repeals are effective June 30, 2002.

Section 17. Amends s. 110.211, F.S., which requires the DMS to adopt model recruitment rules that agencies *may* use. Under the bill, the DMS must adopt uniform recruitment rules that *must* be used by the agencies, unless the Administration Commission grants an exception to the agency.

Section 18. Amends s. 110.213, F.S., which provides that the DMS must adopt model selection rules that employing agencies *may* use. Under the bill, the DMS must adopt uniform selection rules that *must* be used by the agencies, unless the Administration Commission grants an exception to the agency.

Section 19. Amends s. 110.219, F.S., to add that leave benefits provided to Senior Management Service employees shall not exceed those provided to Select Exempt Service employees, and to create a year-end annual leave cash out. Pursuant to the bill, career service employees, subject to available funds, would be permitted to cash-in 24 hours of unused annual leave each December. This benefit is limited as follows: (a) it is only available to those employees with at least 48 hours of annual leave; and (b) no employee is permitted to cash out more than 240 hours annual leave over the course of the employee's career with the state.

Section 20. Amends s. 110.224, F.S., to rename the state's "Review and Performance Evaluation System" to the "Public Employee Performance

Evaluation System." The bill further adds that the performance evaluations are to be used to award lump-sum bonuses in accordance with s. 110.1245, F.S.

Section 21. Amends s. 110.227, F.S., to change the standard for suspensions and dismissals in the career service, and to change the procedures for appealing disciplinary actions. Under the bill, suspensions and dismissals of law enforcement and correctional officers, and firefighters remain subject to existing law's "for cause" standard, while suspensions and dismissals of all other career service employees become subject to a new "reasonable cause" standard. The bill defines "reasonable cause" as "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." Such reasonable cause includes, but is not limited to, poor performance, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug use, or conviction of any crime. The bill specifies that suspension or dismissal based on patronage, discrimination, or arbitrariness or for any conduct that is otherwise protected under state or federal law shall not constitute reasonable cause.

The bill prohibits "bumping," by stating that rules regarding layoff procedures may not include any system whereby a career service employee with greater seniority has the option of selecting a different position not being eliminated, but which is vacant or already occupied by an employee of less seniority. The DMS is directed to develop layoff rules that require consideration to be given to comparative merit, demonstrated skills, and the employee's experience. The bill provides, however, that collective bargaining units may seek to incorporate "bumping" into their agreements.

The bill creates a new grievance process. Under the bill, a career service employee who believes that any condition affecting the employee is unjust, inequitable, or a hindrance to effective operation may file a grievance with the agency. The employee is entitled to an informal hearing, referred to as Step One, with his or her supervisor within seven calendar days thereafter, and to an informal hearing, referred to as Step Two, with the agency head within 14 days thereafter. The agency head is required to respond to the employee in writing within 7 calendar days after the hearing. The bill provides that the agency head is the final authority for all grievances not related to the dismissal, suspension, demotion and reduction in pay.

The bill provides that if a career service employee is subject to dismissal, suspension, demotion, or reduction in pay, the employee must first be notified in writing by the agency before taking action. This notice may be personally delivered or sent regular mail. The employee is entitled to remain in his or her position until receiving both a Step One and Step Two hearing. After the agency has taken its final action, the employee is entitled to file an appeal with PERC within 10 days after receiving the response from the agency head required after the Step Two hearing.

The bill provides the following procedures for PERC hearings: (a) the hearing must be conducted within 30 days of the filing of the notice of appeal, unless exceptional circumstances warrant an extension, which may last no longer than 30 days and must be agreed to by all parties; (b) discovery may only be granted after showing of extraordinary circumstances by the party requesting discovery; (c) the proposed recommended order must be filed by the hearing officers within 21 days after the hearing; (d) exceptions to the order must be filed within five working days after the proposed recommended order is filed; and (e) the final order must be issued no later than 7 days after the filing of exceptions or oral arguments if granted. Final orders may be reviewed by the district court of appeals pursuant to s. 447.504, F.S. The bill specifies that ch. 120, F.S., the Administrative Procedures Act, no longer applies to PERC's hearings regarding disciplinary actions.

The bill requires the PERC to affirm the agency head's decision whenever it finds reasonable cause, and to reverse the decision, with or without an award of back pay, whenever it finds that no reasonable cause existed. Under the bill, the

PERC would no longer be permitted to reduce the penalty imposed by the agency head.

The bill restricts the PERC's and judiciary's review of the disciplinary cases by providing as follows: "Each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts. An action shall not be considered arbitrary if the employer has reasonable cause for the action taken based upon the employee's conduct without regard for the conduct of any similarly situated employee and any action."

Section 25. Amends s. 110.403, F.S., to add that the DMS shall establish a program that develops managerial, executive, or administrative skills, and that includes the following topics: (1) improving the performance of individual employees; (2) improving the performance of groups of employees; (3) relating the efforts of employees to the organization's goals; (4) strategic planning; and (5) team leadership.

Section 26. Amends s. 110.403, F.S., which provides that the number of positions included in the Senior Management Service must not exceed .05 percent of the total full-time equivalent positions in the career service. Under the bill, this cap is increased to 1 percent, effective July 1, 2001.

Section 28. Amends s. 110.602, F.S., which provides that the number of positions included in the Selected Exempt Service must not exceed 1.5 percent of the total full-time equivalent positions in the career service. Under the bill, this cap is removed effective July 1, 2001.

Section 31. Amends s. 288.708(2), F.S., to provide that the executive director of the Florida Black Business Investment Board is subject to law governing the Senior Management Service, rather than law governing "Volunteers" as provided in current law.

Section 32. Amends s. 440.4416(3), F.S., to provide that the executive director of the Workers' Compensation Oversight Board is subject to law governing the Selected Exempt Service, rather than law governing "Volunteers" as provided in current law.

Section 33. Amends s. 509.036, F.S., to provide that a public food service inspector may be subject to suspension or dismissal for "reasonable cause."

Section 34. Amends. S. 216.262, F.S., to provide that a state may be eligible to retain salary dollars for authorized positions that are eliminated after July 1, 2001. The bill requires these positions to be certified to the Legislative Budget Commission. The commission is then required to authorize the agency to retain at least 20 percent of the salary dollars. The amount authorized must be used for permanent salary increases.

Section 36. Amends s. 447.205, F.S., to move the PERC from the Department of Labor and Employment Security to the DMS effective January 1, 2002.

Section 37. Amends s. 447.207, F.S., to provide that the PERC shall hear appeals arising out of any suspension, reduction in pay, demotion, or dismissal as provided in s. 110.227, F.S. The bill removes the PERC's current jurisdiction over career service employee appeals from transfers and layoffs.

Section 39. Amends s. 447.507, F.S., to provide that employees who strike in violation of s. 447.505, F.S., may only be appointed or employed as public employees if they are on probation and at-will for 18 months (current law specifies six months).

Section 40. Amends s. 112.215, F.S., to provide that when permitted by federal law the deferred compensation administrator may provide for a pre-tax trustee to trustee transfer of amounts in a participant's deferred compensation account for the purchase of prior service credit in a public sector retirement system.

Section 41. Repeals s. 125.0108(2)(d), F.S., to remove reference to the now non-existent Career Service Commission.

Section 42. Repeals ss. 944.35(3)(c), and 985.4045(1)(b), F.S., which provide that a PERC finding that a Department of Corrections employee has physically or sexually battered an inmate, or that a Department of Juvenile Justice employee has engaged in sexual misconduct with a juvenile offender shall constitute cause for termination.

Section 43. Creates an undesignated section of law to provide that the PERC, along with its statutory powers, duties, and function, is transferred from the Department of Labor and Employment Security to the DMS effective January 1, 2002.

Section 44. Creates an undesignated section of law to provide that the DMS shall adopt rules to effectuate the provisions of the bill regarding ch.110, F.S., and that all existing rules related to ch.110, F.S., are repealed January 1, 2002.

Section 45. Creates an undesignated section of law to require the DMS to develop a performance agreement between the management employees and their agency head that specifies performance measures and levels of performance expected. The bill requires at least five percent, but no more than 10 percent of the manager's salary to be paid upon achievement of the performance expectations.

Section 46. Creates an undesignated section of law to permit the DMS to contract for the implementation of an alternative retirement income security program for eligible temporary and seasonal employees of the state that is funded from appropriations for other personal services.

Section 47. Amends s. 447.403, F.S., to provide that no mediator shall be appointed to assist in the resolution of impasses if the Governor is the employer.

Section 48. Amends s. 216.163, F.S., to delete the reference to special master or mediators in collective bargaining impasses and the required notifications.

Section 49. Provides that the act takes effect upon becoming a law, except as otherwise provided.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions.

None. The bill applies exclusively to employees of the State of Florida.

B. Public Records/Open Meeting Issues:

None.

C. Trust Fund Restrictions:

None.

D. Other Constitutional Issues:

Florida Civil Service: Since 1956, The Florida Constitution has required a civil service system for state employees. Section 14 of Article 3, Florida Constitution, currently provides:

> By law there shall be created a civil service system for state employees, except those expressly exempted . . .

The constitution does not define the term "civil service system." Legal commentators, however, have stated:

> While security of tenure in office is an important object of the civil service system, and it has been said that civil service statutes have been enacted to afford state and municipal employees with reasonable job security by protecting them from political considerations and partisanship, and that civil service statutes are designed to secure adequate protection to career public employees from political discrimination, the civil service was not established for the sole benefit of public employees, but also to ensure efficient public

> service for state, county, and municipal government.[24]

Currently, Florida's constitutional "civil service system" requirement is implemented by a series of statutes. Section 110.201(1)(a), F.S., provides:

> The department [the DMS], in consultation with agencies that must comply with these rules, shall develop uniform-personnel rules, guidelines, records, and reports relating to employees and positions in the career service.

Section 110.227, F.S., provides for suspensions, dismissal, reductions in pay, demotions, layoffs, transfers, and grievances, and authorizes the DMS to address these matters by rule. Furthermore, this section provides that suspensions and dismissals may only be "for cause."

By specifying "for cause", the Florida statutes give career service employees a property right in their state employment. When a property right in employment is provided by the state, an employee cannot be deprived of that right without procedural due process.[25] The United

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[24] 15A Am Jur 2d *Civil Service* s. 1(2000)(footnotes omitted).

[25] *Mckinney v. Pate*, 20 F.3d 1550 (11th Cir.1994).

States Supreme Court has held that procedural due process consists of providing the tenured employee with, "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the employee may be terminated.[26] That hearing is not a mini-trial and need not definitely resolve the propriety of the discharge."[27] The final resolution regarding the discipline may occur at the post-termination hearing.[28]

Florida's statutes provide procedural due process by requiring that career service employees receive at least 10 days written notice prior to the suspension or termination, and be given an opportunity to appear before the agency or official taking the action to answer orally and in writing the charges against him or her before action is taken.[29] Moreover, the Florida statutes provide for post-termination review of the employer's decision by the PERC and the appellate courts.[30]

Current law's "for cause" standard is removed by the bill, and replaced with

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[26] *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985).

[27] *Mckinney,* 20 F.3d. at 1561.

[28] *Loudermill,* 470 U.S. at 546.

[29] Section 110.227, F.S.

[30] Sections 447.208 and 447.504, F.S.

"reasonable cause." The term "reasonable cause" is defined by the bill to mean, "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." The question that arises due to this change in standards is whether the new standard abolishes a career service employee's property right in state employment.[31]

In order to determine if a state has created a protected property interest by statute, it is necessary to determine if the statute places substantive limitations on official discretion.[32] The contours of "substantive limitations" have been discussed in a concurring opinion by Justice Brennan,[33] as requiring that "particularized standards" and "objective and defined criteria" guide the state's decision makers.

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[31] It appears that the Legislature is permitted to eliminate this property right, assuming that the civil service constitutional provision is never construed to require that state employees have a property right in their employment. *See* 67 C.J.S. *Officers* s.51 (1978) (stating that the legislature may abolish or modify any civil service rights which it has granted and it may adopt a new civil service system and terminate all rights acquired under the prior system); *Department of Corrections v. Florida Nurses Association*, 508 So.2d 317 (Fla. 1987)(stating that any employee's expectation that career service or any particular position therein will exist for infinity is at most a mere hope, as implicit in the employment arrangement is the possibility that the Legislature may consider such employment no longer consistent with the public welfare).

[32] *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

[33] *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467 (1971) *cited with approval* in *Olim*, 461 U.S. at 1747.

There does not appear to be any binding precedent for this state regarding whether the standard of "reasonable cause" as defined in the bill creates a property interest in state employment; however, a somewhat similar issue has been reached by the Ninth Circuit. In Nevada, a statute provided that gaming licenses could be denied for "any cause deemed reasonable" by the commission. The Ninth Circuit ruled that the statute did not create a property interest as, "[t]he only substantive restriction imposed upon the Commission's exercise of authority is the requirement that the basis for its decisions be reasonable. This wide discretion resting with the Gaming Commission negates Jacobson's claim to protected property interest created by the state."[34]

The new standard created by the bill is not precisely the same as the Nevada standard. The bill does not require ***any*** reasonable cause as did the Nevada statute. Instead, it requires that "reasonable cause" be "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." The bill's standard appears to provide more defined criteria than the Nevada statute; however, it can still be argued that the bill's criteria is not sufficiently objective and particularized to create a property right. It is difficult to predict how a court might rule on this issue given the lack of binding precedent on the issue.

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[34] *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)

In any case, the bill may provide sufficient procedural due process in the event the "reasonable cause" standard is construed by a court to afford career service employees a property right in state employment. Under the bill, a suspended or terminated employee is entitled to pre-termination/suspension notice and a hearing with his or her supervisor and agency head. Moreover, the employee may appeal the disciplinary action once it has been taken to the PERC and the courts.

Consideration of case law when reviewing disciplinary appeals: The bill provides in s. 110.227(6), F.S., that: "Each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts." Strictly construed, this provision appears to mean that each time the PERC or the court reviews an employment case, it would not be permitted to consider any previous PERC order, nor any prior case law. Moreover, the judiciary would effectively be prohibited from issuing binding precedent when reviewing PERC orders.

From a pragmatic standpoint, this provision will result in a substantial increase in labor for both the PERC and the courts. Furthermore and more importantly, this provision likely contravenes *stare decisis* principles and violates the separation of powers doctrine. As explained by the Tenth Circuit:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 177-78, 2 L.Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 544, 111 S.Ct. 2439 115 L.Ed.2d 481 (1991); *Cohens v. Virginia,* 6 Wheat. 264,399, 5 L.Ed. 257 (1821).[35]

Thus, one purpose of the stare decisis doctrine is to keep the law stable. Another purpose is:

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[35] *Anastasoff v. U.S.,* 223 F.3d 898 (8th Cir. 2000).

> . . . according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries 258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinion...." *Id.* at 256.[36]

The purpose of *stare decisis* appear to be defeated by the provision in the bill. There would be no stability in the law as each time the PERC or the court reviewed a case, it would be one of first impression; i.e., each time the PERC and the court will have to interpret anew what the law means and how it should be applied to the instant facts. Moreover, the bill may violate the separation of powers doctrine by prohibiting the judiciary, which is constitutionally responsible for interpreting the law, from rendering binding interpretations.

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[36] *Anastasoff,* 223 F.3d at 902.

The bill continues in s. 110.227(6), F.S., by adding that, "An action shall not be considered arbitrary if the employer has reasonable cause for the action taken based upon the employee's conduct without regard for the conduct of any similarly situated employee and any action." Article I, s. 2 of the Florida Constitution and section 1 of the 14th Amendment in the United State Constitution sets forth constitutional guarantees of equal protection, which require reasonable conformity when dealing with similarly situated persons.[37] This provision of the bill may be challenged on equal protection grounds in that it may result, particularly when read in conjunction with the sentence discussed above, in similarly situated state employees being treated differently with regard to discipline. In order for this provision to be constitutional, the classification created by the legislation must be rationally related to achievement of a statutory purpose. In other words, any disparate treatment of state employees, which may ensue from this provision, must be rationally related to achievement of the apparent statutory purposes of increasing employee accountability and providing supervisors with greater flexibility to manage their employees.

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[37] *Meola v. Department of Corrections*, 732 So.2d 1029 (Fla. 1998).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill provides for the transfer of certain managerial, confidential, and supervisory employees from the Career Service to the Selected Exempt Service. The OPB has estimated that 16,320 employees will be transferred. Due to the costs of increased benefits for these employees, the fiscal impact is estimated to be $17.3 million.

The cash value of accrued leave is not funded in the ordinary sense of the term. Agencies use the budgetary devices of position lapse and salary rate to manage their appropriated funds.

The alternative OPS benefits provisions of the bill are designed to provide part-time, seasonal, and temporary workers with a personally-owned pension outside of Social security. This program, authorized for government employers under s. 3121 of the Internal Revenue Code permits public employers to provide such workers with a defined contribution pension plan, similar to an Individual Retirement Account, for their service. The advantage to the public employer is that it is forgiven the 6.2 percent employer match for the Social Security payroll contribution. For the employees the advantage is that the alternative benefit plan provides a greater expectation of return than Social Security. The overall rate of investment return on Social Security contributions is less than 2 percent per year. A conservative allocation of funds in a personally managed account should result in a minimum return of 5 percent per year. Estimated maximum employer savings through this provision in the bill is $10 million to $12 million annually.

The reduction in maximum earned leave for senior managers will not materially affect savings. The reasons for this stems from the fact that both senior managers and selected exempt service employees have a maximum carryover of 480 hours under present DMS rules. Only those employees terminating prior to reaching this accrual limit will experience an actual loss from this provision. The leave provisions for management and exempt classes are set by rule of the DMS, not by statute. The agency has the ability itself under current law, to change these limits irrespective of the contents of this bill.

Further fiscal information on this bill has not been provided by the agency.

VI. Technical Deficiencies:

Throughout the bill, law enforcement and correctional officers, and firefighters are exempted from the newly created "reasonable cause" standard. The bill provides that these groups of employees remain subject to the "just cause" standard; however, it does not specify whether the new grievance process created by the bill applies to these exempted employees, or if existing law's grievance procedure applies.

On pages 37 through 39, the bill refers to "informal hearings" and "proposed recommended orders" when describing the grievance process. These are terms of art used in ch.120, F.S., the Administrative Procedures Act. The bill, however, exempts the grievance process from the requirements of ch.120, F.S. Moreover, it would appear, given the context of the terms within the bill, that the ch.120, F.S., meaning of these terms is not intended.

On page 37, the bill provides for an initial hearing with the employee and his or her supervisor to be held within seven calendar days following the employee's filing of the grievance. A second hearing with the agency head is automatically thereafter required by the bill, notwithstanding whether the employee's grievance is sufficiently resolved by the supervisor.

On page 40, the bill deletes existing language that provides that a career service employee may be immediately terminated if retention of the employee would result in damage to state property, would be detrimental to the best interest of the state, or would result in injury to the employee. Under the bill, all career service employees are entitled to remain in their positions until they receive hearings with both their supervisors and their agency heads.

On pages 37 through 39, the bill describes the grievance hearing process and exempts the process from ch.120, F.S. In so doing, the requirement in s.120.57(1)(g), F.S. that the agency maintain an official transcript which it must provide to the parties upon request at cost does not apply. If such transcripts are not required to be made available to the parties, effective appellate review will not be feasible.

VII. Related Issues:

Exemption from Chapter 120: Under existing law, legislatively mandated uniform procedures for PERC hearings on employee discipline are provided by ch.120, F.S., the Administrative

Procedures Act. The central purpose of the act is to provide:

> [B]asic fairness which should surround all governmental activity, such as the opportunity for adequate and full notice of agency activities, the right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court review, the right to locate precedent and have it applied, and the right to know the factual bases and policy reasons for agency action.[38]

The bill exempts the DMS from ch.120, F.S., requirements when conducting the career service grievance process under s. 110.227(4) and (5), F.S. Thus, it would appear that the DMS and PERC is not required adopt any rules that specify procedures for the grievance process.[39] However, s. 110.227(2), F.S., in the bill retains existing law that requires the DMS to establish rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees in the career service.

As a result, it is unclear as to whether rules that prescribe the grievance process must be promulgated. If rulemaking is not required, procedures for the grievance process may be developed without public input and without the need for specific statutory authority, and may routinely be changed without any public notice.

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[38] *Friends of the Hatchineha, Inc. v. State, Dept. of Environmental Regulation*, 580 So.2d 267, 271 (Fla. 1st DCA 1991).

[39] Sections 120.52 and 120.54, F.S.

It is clear that under the ch.120, F.S., exemption, in the bill that the grievance hearings need not be conducted in accordance with the extensive uniform hearing procedures provided in ch.120, F.S., which include specifying permissible pleadings and motions, subpoena powers, evidentiary procedures, requirements for maintaining a record of the proceedings, and publication requirements.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

APPENDIX J

IN THE COUNTY COURT
OF THE SECOND
JUDICIAL CIRCUIT, IN
AND FOR LEON
COUNTY, FLORIDA.

STATE OF FLORIDA

CASE NO. C2002-01751am
SPN 147893

vs.

RICHARD A. BRAY,
Defendant.
______________________________/

NO INFORMATION

COMES NOW WILLIAM N. MEGGS, State Attorney, by and through the undersigned Assistant State Attorney, and enters this NO INFORMATION in the above-styled cause, and as grounds therefore, would show:

1. Defendant was arrested and charged with Stalking.

2. Florida Statute 748.048 states that "Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking."

3. On the facts of this case the victim did not make her rejection of the defendant's advances sufficiently clear under the law to qualify those advances as malicious.

4. The Defendant was also charged with Making a False Official Statement in Writing. The Defendant, via e-mail, reported to the investigator that the victim called him at home and questioned "Who is Harassing Who? I don't know what she is doing, but this needs to stop."

5. The victim admits that she called not knowing it was the defendant's home, and that when she realized who it was, she hung up. Therefore, the statement that the defendant made was not false.

6. Therefore, the State would be unable to prove the elements of Stalking and Making a False Official Statement beyond a reasonable doubt.

Dated on September 4, 2002.

/S/________________
Sharon S. Traxler
Assistant State Attorney

Copies to:
Tallahassee Police Department
Department of Environmental Protection, William Walls, Investigator
Clyde Taylor, 211 E. Call St., TLH, FL

APPENDIX K

16-17 FLORIDA CAREER SERVICE REPORTER

STATE OF FLORIDA
PUBLIC EMPLOYEEES RELATIONS COMMISSION

RICHARD A. BRAY,

Employee,

v.

Case No. CS-2002-074
Order Number: 02CS-180
Issue Date: May 30, 2002

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Agency.

_______________________________________/

Before Poole, Chair and Kossuth, Jr., Commissioner.

APPEARANCES

Daniel W. Hartman, Tallahassee, attorney representing employee.

Marshall Wisehart, Tallahassee, attorney representing agency.

FINAL ORDER

On February 25, 2002, the Department of Environmental Protection (Agency) dismissed Richard A. Bray pursuant to the extraordinary procedures provisions of Section 110.227, Florida Statutes (2001), for alleged conduct unbecoming a public employee, insubordination, violation of the Agency's computer security policy, and sexual harassment. Bray appealed his dismissal to the Public Employees Relations Commission (Commission). The Commission appointed a hearing officer and an evidentiary hearing was held in Tallahassee. On April 25, the hearing officer issued his recommended order, concluding that the Agency had cause to dismiss Bray for violation of the Agency's computer security policy. He recommended dismissing the other three charges because the Agency failed to prove those charges. Finally, the hearing officer concluded that the Agency properly invoked and implemented the extraordinary situations procedure pursuant to Section 110.227(5)(b), Florida Statutes. On May 1, Bray filed timely exceptions. A transcript of the hearing has been filed with the Commission.

The facts as found by the hearing officer are as follows. Bray worked for the Agency in the permitting process for large wetland treatment systems built under the provisions of the Everglades Forever Act. The contents of his computer were subject to public records requests made pursuant to Chapter 119, Florida Statutes (2001).[1] Frank Nearhoof, his supervisor, did not object to his subordinates working on non-work related activities during their breaks or lunchtime.

On January 24, William Walls an inspector of the Inspector General's staff informed Bray that the Agency was conducting an internal investigation of him, including allegations that he sexually harassed Kim Shugar, a co-worker. Bray was placed on administrative leave and was told that he must coordinate any communication with Agency personnel through Walls.

In an investigatory interview with Walls, Bray revealed that Shugar was pursuing other employment in real estate and stated that he had heard her conducting real estate business by telephone from her Agency office. While Bray was on administrative leave, he called the real estate office where Shugar worked and spoke with William Rayner. Bray wanted to determine whether Shugar's real estate employment conflicted with her Agency employment in order to file a complaint against her. Bray gave Rayner his telephone number and a false name. Although Bray did not ask Rayner to have Shugar call him back, Rayner forwarded a message to Shugar for her to call Bray because Rayner assumed from Bray's inquiry about Shugar that he wanted to speak with her.

After Shugar called Bray, she paged Walls to report that she had called Bray, recognized his voice, and hung up on him. Bray sent a message by e-mail and a voice mail message to Walls complaining that Shugar had called him and was harassing him.

During the investigation of Bray, Walls discovered at least eleven e-mails stored on Bray's computer that were not work-related. The e-mails included pictures of nude women, a picture of nude men, jokes of a sexual nature, a cartoon video of a character defacating, a video of a donkey attempting to copulate with a man, personal correspondence of a social and flirtatious nature, and personal correspondence regarding an educational book authored by Bray titled "Ana Lee the Manatee." Bray stored these e-mails in computer subfolders that he created. The two personal correspondence e-mails were composed by Bray: the remaining nine e-mails were sent to Bray.

On February 25, Bray was informed of the allegations against him and that he was being dismissed under the extraordinary situations procedures of Section 110.227, Florida Statutes. Bray was given a number of documents, including a copy of the Agency's investigative report, and was told that he could request a conference at 3:30 p.m. that day if he wished to do so. Bray was not given all the evidence supporting the allegations against him.

Bray, accompanied by his attorney, attended the conference on February 25 and stated that he had not been given adequate time to respond to the allegations. The Agency gave him two additional days to submit a written response. However, he did not submit a written response because he felt that the time was still too short and because he had not been provided with all the evidence against him.

Based on these facts, the hearing officer concluded that the Agency demonstrated that Bray violated its computer security policy, defined by the Agency as "the deliberate failure to abide by the Department's established security policy. . .[including] the use of the computer for non-work related activities." The hearing officer determined that, even though Bray did not create the majority of the eleven e-mails described above, he nonetheless violated the Agency's policy by storing the eleven e-mails in folders he created on his computer. The hearing officer also concluded that the Agency failed to substantiate the charges of conduct unbecoming a public employee and insubordination based on Bray's alleged contact with Shugar through the real estate office and failed to present any evidence of the sexual harassment charge. Therefore, the hearing officer recommended that these three charges be dismissed. Finally, the hearing officer found that the Agency followed the proper procedure for dismissing Bray pursuant to the extraordinary situations procedures of Section 110.227, Florida Statutes.

Bray filed two exceptions to the hearing officer's recommended order. In a portion of his first exception, Bray argues that the hearing officer erred in distinguishing between receiving e-mails and creating folders to store them. Bray asserts that such an exceedingly narrow distinction is unnecessary and immaterial, and that because his supervisor knew of the participated in sending and receiving humorous e-mails, the Agency condoned Bray's conduct and is prohibited from disciplining him.

We agree with the hearing officer that a violation of the Agency's policy does not occur simply by receiving an item by e-mail. Because Bray did not have control over such receipts, they could not constitute "the deliberate failure to abide by the Department's established security policy."

The legislature amended Section 110.227(7), Florida Statutes, in 2001 to prohibit the Commission from considering any other case or set of facts in a case not involving a law enforcement officer, correctional officer, firefighter, or professional health care provider. The Commission has not previously determined whether condonation remains a viable defense in the wake of this statutory change inasmuch as the facts have failed to evince condonatioin in each post-Service First case in which this defense has been raised. Killins v. Department of Juvenile Justice, 16 FCSR 474 (2001); Taylor v. Department of Revenue, 16 FCSR 542 (2001). Likewise, in the instant case we need not determine this issue because we agree with the hearing officer's conclusions that Bray has failed to prove that the Agency condoned his conduct.

In reaching this conclusion, we reject Bray's assertion that his conduct was identical to that of his supervisor. He claims that Nearhoof received humorous e-mails and stored them on his computer. However, Nearhoof used such stored materials to lighten technical presentations he was required to give as a part of his job. Bray did not contend that the humorous e-mails Nearhoof stored in his computer contained nude pictures, jokes of a sexual nature, or cartoons depicting defecation or copulation, or were offensive in any way.

Thus, unlike Bray's conduct, Nearhoof used his computer to store humorous materials he used for his work.

In support of is condonation defense, Bray offered e-mails that were sent to him by a former Agency employee, Nearhoof, and another Agency employee. The hearing officer considered these e-mails and concluded that they demonstrated that Nearhoof knew that Bray received two e-mails unrelated to work since one of the e-mails was sent to both Nearhoof and Bray by a former employee and the other was sent to Bray by Nearhoof. However, the evidence did not demonstrate that Nearhoof or other Agency supervisors stored such materials or knew of other employees who stored such materials on their computer. Thus, we agree with the hearing officer's determination that the Agency did not condone Bray's conduct since the evidence was insufficient to establish that the practice of storing e-mail unrelated to work was widespread throughout the Agency or that Nearhoof routinely ignored violations of the Agency's computer security policy. See, Department of Business and Professional Regulation v. Doyle, 750 So.2d 746 (Fla. 1st DCA 2000). Accordingly, this portion of Bray's first exception is denied.

In the remaining portion of his first exception, Bray contends that because Nearhoof and the Agency assisted Bray in marketing his book, "Ana Lee the Manatee," his work on the book should be considered work-related. However, notwithstanding that Nearhoof permitted his subordinates to conduct activities unrelated to work during their breaks, and that Nearhoof attempted to assist Bray by securing a favorable bulk mailing rate for the book, there was no evidence presented that Nearhoof authorized Bray or any of his subordinates to use their computers in violation of the computer security policy. Accordingly, the remainder of exception one is denied.

In exception two, Bray concedes that after the Service First legislation, the Commission lacks jurisdiction to mitigate his dismissal. §110.227(6)(c), Fla.Stat. However, he argues that because the agency has selected the most severe discipline under its guidelines for what he characterizes as minor transgressions, the Commission should find that the Agency has not demonstrated "cause" for dismissing him. Otherwise, Bray asserts, Section 110.227(6)(c), Florida Statutes, gives the Agency unbridled discretion to dismiss employees in violation of the Florida Constitution. Art. II, §3, Fla. Const.

Pursuant to Section 110.227(6)(c), Florida Statutes, once an agency demonstrates cause for discipline, its choice of penalty will not be disturbed if it is within the range established by the agency. Contrary to Bray's argument, an agency has unfettered authority to impose the most severe penalty allowed by the law and its rules for any offense proven. Thus, we reject Bray's argument that we should find no cause for discipline merely because the Agency has imposed the most severe penalty available under its guidelines.

The Commission recognizes that it is required to evaluate the constitutional implications and consequences of the application of the statutes which it is charged to interpret and apply. See, CWA v. City of Gainesville, 697 So.2d 167 (Fla. 1st DCA 1997); Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737 v. Escambia County School Board, 426 So.2d 1017 (Fla. 1st DCA 1983), aff'd, 7 FPER ¶12395 (1981). However, the Commission has no authority to rule on the constitutionality of the statutory provision eliminating the Commission's mitigation authority for certain employees. See, Losch v. Department of Juvenile Justice, 17 FCSR 1 (2002).

Here, the Agency demonstrated that Bray engaged in conduct that violated its computer security policy. Thus, cause for discipline existed. Pursuant to the Agency's guidelines, the available penalties for a first violation of the Agency's computer security policy include dismissal. Therefore, we agree with the hearing officer's conclusions that the Agency followed its disciplinary guidelines and did not abuse its discretion by dismissing Bray. Accordingly, Bray's second exception is denied.

Upon review of the complete record, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding that satisfied the essential requirements of law. Furthermore, we agree with the hearing officer's analysis of the disparities legal issues, his conclusions of law, and his recommendations. Accordingly, the hearing officer's recommended order is ADOPTED as the Commission's final order and Bray's appeal is DISMISSED. §120.57(1)(1), Fla. Stat. (2001).

[appeal right paragraph deleted]

It is so ordered.

ENDNOTE

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[1] We take notice of Times Publishing Company v. City of Clearwater, 27 Fla. L. Weekly D1073a (Fla. 2nd DCA May 10, 2002). Although this case may have changed the hearing officer's finding of what computer material was subject to public records requests, it is not dispositive in this case.

HEARING OFFICER'S RECOMMENDED ORDER

April 25, 2002

Lopez, Hearing Officer.

By a letter dated February 25, 2002, Richard A. Bray received a notice of final action from the Department of Environmental Protection (Agency) dismissing him under the extraordinary procedures provision of Section 110.227, Florida Statutes (2001), for alleged conduct unbecoming a public employee, insubordination, violation of the Agency's computer security policy, and sexual harassment. Bray appealed his dismissal to the Public Employees Relations Commission (Commission). On March 22, the Commission appointed the undersigned as hearing officer.

After due notice, an evidentiary hearing was conducted in Tallahassee April 10. The parties were afforded the opportunity to appear, submit evidence, cross-examine witnesses, and fully participate in the hearing. Bray invoked the rule of sequestration of witnesses and the witnesses were instructed accordingly. Each party offered seven exhibits all of which were admitted into the record. Neither party presented oral closing argument.

The parties timely filed post-hearing pleadings, including findings of fact, which I have considered in making my recommendation. A transcript of the hearing has been filed with the Commission.

FINDINGS OF FACT[1]

Background

1. At all times pertinent to this appeal, Bray was a permanent status career service system employee employed as an environmental specialist III. He was employed by the Agency for seven years. Prior to that time he worked for another state agency for five years. Bray had never been disciplined prior to his dismissal. (T at 13, 92, 99)

2. As an environmental specialist III, Bray was involved n the permitting process for large wetland treatment systems built under the provisions of the Everglades Forever Act. The contents of Bray's officer computer were subject to public records requests made pursuant to Chapter 119, Florida Statutes (2001). (T at 73-74)

3. Frank Nearhoof was Bray's immediate supervisor. Nearhoof considered Bray a good employee. Nearhoof did not object to his subordinates working on non-work related activities during their breaks or lunchtime. (T at 73, 75, 79)

4. On January 24, 2002, Bray was placed on administrative leave while the Agency conducted an internal investigation which included an allegation that he sexually harassed Kim Shugar, a co-worker. Investigator William Walls explained the contents of the letter placing Bray on administrative leave after which Bray was escorted to his office to retrieve his personal items. At some point Bray informed Walls that he might find some strange things on his computer. (T at 29-30, 104-105; Agency Exhibit 3)

5. Bray was notified verbally and in writing that while on administrative leave "any communication with personnel within the Division is to be coordinated through Investigator William Walls of the Inspector General's staff." While on administrative leave, Bray was diligent in reporting to Walls if he had a doctor's appointment or was going to be otherwise unavailable because Bray was subject to being recalled to work. Bray was also diligent in clearing any contacts with Agency employees through Walls. (T at 27-31, 54, 115; Agency Exhibit 3)

6. Bray knew that Shugar was pursuing a real estate career prior to being placed on administrative leave. He informed Investigator Walls of Shugar's secondary employment at a January 24 interview. He reported that he had overheard Shugar conducting real estate business by telephone from her Agency office. (T at 26, 101, 112-114; Employee Exhibit 3)

7. While on administrative leave, Bray decided to make inquiries regarding Shugar's secondary employment in real estate. He wanted to discover

whether her secondary employment conflicted with her Agency employment so that he could file a complaint against her. (T at 27, 100)

8. On Monday, February 11, at 9:41 a.m., Bray called Rayner Real Estate. His call was recording by an answering machine. Bray identified himself as "Rich", stated he had a real estate question, left his telephone number, and asked to have his call returned. William Rayner, the owner of the real estate company, returned Bray's call. (T at 16-17, 99; Agency Exhibit 1)

9. Bray told Rayner that he was gathering information for some future time when he would be in a position to purchase real estate.[2] He further stated that acquaintances had recommended Shugar for his future real estate needs. He inquired whether Rayner thought she would do a good job. (T at17-18, 110-111)

10. At not time during his conversation with Rayner did Bray ask to speak to Shugar or to have her call him. However, based on their conversation, Rayner concluded that Bray wished to speak to Shugar and so forwarded Bray's message to Shugar. Shugar subsequently told Rayner that she had called Bray. (T at 18-19, 21-22, 100)

11. On February 11 at 7:20 p.m., Shugar paged Investigator Walls. Walls answered the page at which time Shugar reported that when she called the number given to her by Rayner, she recognized Bray's voice and hung up the telephone. At 7:39 p.m., Bray sent an e-mail to Investigator Walls complaining that Shugar had called and was harassing him. Bray confirmed the e-

mail the following morning by leaving Walls a voice mail message. (T at 31-33; Agency Exhibit 4)

12. During his investigation, Walls discovered at least eleven non-work related e-mails stored on Bray's computer. Included in these e-mails were pictures of nude women, a picture of nude men, jokes of a sexual nature, a cartoon video of a character defacating, a video of a donkey attempting to copulate with a man, personal correspondence of a social and flirtatious nature, and personal correspondence regarding an educational book authored by Bray titled "Ana Lee the Manatee." (T at 34-42, 61-63, 111; Agency Exhibits 5 and 6)

13. Except for the personal correspondence which Bray composed, the remaining nine e-mails were sent to Bray. Bray stored these e-mails in one of three computer subfolders which he created titled funny clips, letters and pictures. Bray drafted the personal correspondence on his lunch or break time. (T at 35-36, 43, 93-98, 112)

14. On February 25, Bray was informed of the allegations against him and that he was being dismissed under the extraordinary procedures provision of Section 110.227, Florida Statutes. Bray was provided a number of documents, including a copy of the Agency's investigative report, in the morning and told that he could request a conference at 3:30 p.m. on this same day if he wished to do so. This deadline would have afforded him a few hours to prepare for the conference. Bray was not provided with all the evidence supporting the allegations against him. (T at 106-110)

15. Bray attended the conference on February 25 and was accompanied by his attorney. Bray informed the Agency's representative that he had not been provided an adequate opportunity to respond to the allegations. He was told he could prepare a written response within two days. Bray did not submit a written response because he felt the time provided was inadequate and because he had not be provided all the evidence against him. (T at 106-110)

16. The Agency defines conduct unbecoming a public employee as "conduct whether on or off the job, that adversely affects the employee's ability to continue to perform the duties of his/her current job, including an act which violates decency or morality, which discredits the department, or which adversely affects the department's ability to carry out its mission." (Agency Exhibit 7)

17. The Agency defines insubordination as "a deliberate and inexcusable refusal to comply with a lawful order or directive, written or oral, which relates to the employee's job functions. This includes both expressed refusal to obey a proper order, as well as the deliberate failure to carry out an order." (Agency Exhibit 7)

18. The Agency defines a violation of department computer security policy as "the deliberate failure to abide by the Department's established security policy. This includes: (a) unauthorized release of password, (b) failure to secure computer data, (c) unauthorized copying of licensed software, and (d) the

use of computer for non-work related activities." (Agency Exhibit 7)

19. The Agency defines sexual harassment, in pertinent part, as "slurs, derogatory statements, discriminatory remarks, or any other verbal or physical conduct of a gender specific or sexual nature, which is offensive or objectionable to the recipient and has the purpose of or effect of interfering with the recipient's job performance." (Agency Exhibit 7)

20. An Agency's employee is subject to dismissal for a first occurrence of unbecoming conduct, insubordination, violation of the computer security policy, or sexual harassment. (Agency Exhibit 7)

ISSUES

1. Whether the Agency had cause to dismiss Bray?
2. Whether the Agency properly invoked and implemented the extraordinary procedures provision of Section 110.227(5)(b), Florida Statutes (2001)?

ANALYSIS AND DISCUSSION

I. Cause for Discipline

In accordance with Section 110.227(1), Florida Statutes (2001), an employee who has permanent status in the state career service system, as did Bray at the time of his dismissal, may only be dismissed for "cause." The Agency had the burden at the hearing to prove cause by a preponderance of the evidence.

a. Sexual Harassment Charge

Shugar, the subject of the alleged sexual harassment, did not testify at the hearing. The evidence presented in support of this allegation was hearsay. (T at 89-91; Exhibit 2) I am unable to make any factual findings regarding the sexual harassment allegation because the hearsay evidence was not of a type which would be admissible over objection in civil actions. §120.57(1)(c), Fla. Stat. (2001). Accordingly, this allegation should be dismissed because it was not proven.

b. Unbecoming Conduct and Insubordination Charges

These charges are based upon the allegation that Bray contacted Shugar despite having been instructed not to do so while on administrative leave.[3] The unbecoming conduct charge is also based upon Bray's filing a false statement with Investigator Walls regarding the telephone call he received from Shugar. Crucial to this charge is the conversation between Bray and Rayner.

Bray admitted calling Rayner's Real Estate and leaving a message on which he identified himself as Rich. Rayner testified that when he returned Bray's call, Bray identified himself as Smig or Smidge. (T at 17, 20) The transcript of Rayner's interview with Investigator Walls states that the caller identified himself as Smidge Patterson. (Employee Exhibit 2) Bray disputed using a different name when Rayner returned his call. (T at 12) Whether Bray used a different name when he splke to

Rayner need not be resolved because it is not determinative of this charge.

Here, there is a lack of evidence demonstrating that Shugar would have been at the real estate office at 9:41 a.m. when Bray placed his telephone call. Even if she had been there, no evidence exists establishing that Shugar would have answered telephone inquiries coming into the real estate office given that she had only been employed by the real estate officer for two weeks before Bray placed his call. (T at 16)

More importantly, a review of Rayner's testimony, his interview with Walls, and Bray's testimony reveals that Bray never asked to speak to, nor left a message for, Shugar. Rather, Rayner concluded from his conversation with Bray that he should pass along the message to Shugar as a lead for a possible sale. (T at 21-22) Bray had no control over Rayer's action which resulted in Shugar calling Bray. To conclude under these facts that Bray intended to speak with Shugar requires the adoption of a convoluted scenario which I decline to do.

Based on the foregoing, I conclude that the Agency failed to prove by a preponderance of the evidence that Bray intended to contact Shugar. See, Yeager v. Department of Health, 16 FCSR ¶241 (2001) (intent is a question of fact for the hearing officer to decide). Similarly, the evidence does ot prove that Bray filed a false report with Investigator Walls regarding his contact with Shugar. Accordingly, the unbecoming conduct and insubordination charges should be dismissed.

c. Violation of Computer Security Policy Charge

Investigator Walls discovered at least eleven non-work related e-mails on Bray's computer. Nine of the eleven e-mails are properly described as crude, offensive, vulgar, and/or of a sexual nature; one is of a personal, social, and flirtatious nature; and one is of a personal business-related nature.

Bray admitted composing the two personal e-mails. I credit his testimony that he received the remaining e-mails from others, rather than retrieving them from the Internet. Bray admitted that after composing or receiving these e-mails, he stored them in computer folders which he created. In doing so, Bray used his computer for non-work related activities which is a violation of Agency policy.

In his defense, Bray offered other e-mails from co-workers, including some of a sexual nature, which he also received and stored on his computer at work. (T at 111) Bray contends that Nearhoof, his supervisor, knew of or sent some of these e-mails, did not tell him to delete them, and did not discipline anyone for sending them. (T at 81-82, 98) Thus, he argues that the Agency condoned his conduct.

The Commission has held that an agency which routinely condoned deviations from a particular rule or directive could not punish an employee for violating that rule in the same way as was previously condoned without notice of a new enforcement policy. See, Eddins v. Department of Corrections, 9 FCSR ¶066

(1994), citing Robinson v. Department of Health and Rehabilitative Services, 7 FCSR ¶182 (1992) and Noll v. Department of Natural Resources, 3 FCSR ¶252 at 150 (1988), relating to 4 FCSR ¶064 (1989), aff'd, 553 So.2d 1169 (Fla. 1st DCA 1989); Miller v. Department of Corrections, 16 FPER ¶235 (2001), citing Doyle v. Department of Business and Professional Regulation, 13 FPER ¶1064 (1998), aff'd, 750 So.2d 746 (Fla. 1st DCA 2000) (cause for discipline does not exist for violating an agency policy or rule if an agency is aware of other similar violations of the rule in question and has not disciplined its employees, or otherwise warned employees that future violations will result in discipline). The burden of proving condonation is on the employee who has violated the rule or policy. See, Eddins, 9 FCSR at 286.

I will now review the eight e-mails Bray offered in support of his condonation defense. Six of the e-mails were sent by Chip Collette, Bray's co-worker. (Employee Exhibit 4) None of these indicate that they were also sent to Nearhoof. One e-mail was sent by Kellie Ralston to Bray and Nearhoof. (Employee Exhibit 7) The other e-mail, which had an audio attachment containing offensive language, was sent to Bray by Nearhoof. (T at 80-81; Employee Exhibit 6)

The foregoing establishes that Nearhoof knew of two instances in which Bray received e-mails which were not work related. The evidence is insufficient to determine whether Nearhoof supervised Ralston, or even whether she was still an Agency employee, at the time she sent her e-mail. (T at 79-82) Similarly, the evidence is insufficient to determine whether any other Agency employees stored these e-mails as Bray did. (T at 80, 84, 86)

Rather, the evidence only demonstrates that Nearhoof sent an e-mail to Bray which was not work related on one occasion. Nearhoof acknowledged that in retrospect he should not have sent the e-mail with the audio attachment to Bray. (T at 81) The evidence does not establish that Nearhoof stored this e-mail or knew of anyone who stored such e-mails, or that anyone above Nearhoof knew of this practice. Thus, Bray failed to provide by a preponderance of the evidence that Nearhoof or his superiors routinely condoned deviations from the Agency's computer security policy.

Bray next argues that his personal correspondence did not violate Agency rules because it was written during lunch or while on break. Nearhoof testified that he did not have a problem with a subordinate performing a non-work related activity during lunch or break times. (T at 79) However, this testimony cannot necessarily also be interpreted to mean that Nearhoof authorized his subordinates to use an Agency computer in contravention of the applicable policy.

Bray also contends that the personal correspondence regarding "Ana Lee the Manatee" was done with the support of Nearhoof. Nearhoof did not know about Bray's book until after it was published and, therefore, could not have acquiesced to Bray's conduct. (T at 77-78) Furthermore, Nearhoof's subsequent letter attempting to secure a favorable bulk mailing rate for Bray from the Agency's mailroom supervisor cannot be used to authorize conduct which preceded it. (Employee Exhibit 5)

In his brief, Bray argues that because the contents of his computer were subject to public records requests pursuant to Chapter 119, Florida Statutes, he was required to "maintain the record as a public record and will not be excused or exonerated from any unauthorized or unlawful disposition of such record." §119.07(2)(d), Fla. Stat. (2001). Thus, he asserts that he was "prohibited by law from destroying the images, video clips, audio clips and/or text messages placed on his computer."

Bray did not testify at the hearing that he stored the e-mails at issue because of his concerns regarding Chapter 119. Moreover, "public records" are defined at Section 119.011(1)as:

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. (emphasis added)

The statutory definition does not appear to encompass non-work related pictures of nude women and men, jokes of a sexual nature, a video cartoon of a character defecating, a video of a donkey attempting to copulate with a man, and/or personal correspondence of a social or business nature.

Bray violated the Agency's computer security policy when he used his computer for personal correspondence. I am unpersuaded that he violated the policy simply by receiving e-mails over which he did not have control. (T at 82-83, 98) However, Bray knew how to delete them after receipt. (T at 111-112) He violated the Agency policy when he chose to store the e-mails for personal use. (T at 112)

Finally, Bray offered evidence regarding the length of his employment, his good employment record, and his lack of prior discipline. However, these facts address mitigation which is not available to Bray since the adoption of the amendments to the career service laws in 2001. See §110.227(6)(c), Fla. Stat. (2001)

Having determined that the Agency had cause for discipline, I next consider whether the Agency followed its disciplinary guidelines. This was Bray's first violation of the Agency's computer security policy. This offense has a range of discipline which encompasses a dismissal. Accordingly, the Agency followed its guidelines and, therefore, has not abused its discretion in the selection of the discipline imposed.

II. Implementation of Extraordinary Procedures

Bray contends that the Agency did not afford him the required notice and opportunity to rebut the allegations against him pursuant to the requirements of the extraordinary procedures provision of Section

110.227, Florida Statutes. Section 110.227(5)(b), Florida Statutes (2001), states in pertinent part:

> In extraordinary situations such as when the retention of a permanent career service employee would result in damage to state property, would be detrimental to the best interest of the state, or would result in injury to the employee, a fellow employee, or some other person, such employee may be suspended or dismissed without 10 days' prior notice, provided that written or oral notice of such action, evidence of the reason therefore, and an opportunity to rebut the charges are furnished to the employee prior to such dismissal or suspension. Such notice may be delivered to the employee personally or may be sent by certified mail with return receipt requested. Agency compliance with the foregoing procedure requiring notice, evidence, and an opportunity for rebuttal must be substantiated.

Here, the evidence establishes that at the time it issued its final action letter, the Agency concluded that it had evidence to support various charges against Bray, including that of sexually harassing one of its employees. The sexual harassment charge was sufficient to invoke the extraordinary procedures provision as a means of protecting an Agency employee from further injury.

The February 25, 2002, final action letter included several attachments, including a copy of the Agency's internal investigation. (Agency Exhibit 2) Bray was provided a few hours on the date of his dismissal to review and rebut the charges against him. Bray informed the Agency that he did not have enough time in which to present his verbal response. He was then provided two additional days to submit a written response.

Although Bray made a public records request of the Agency on February 26, at no time did he inform the Agency that he would not be submitting a written response by February 27, or that the written response was contingent upon receiving the requested information. (Employee Exhibit 1) Rather, Bray did not submit a written response on February 27 concluding that he did not have enough time to prepare and had not been provided all the evidence supporting the charges against him. There is no evidence that Bray requested an extension of time for filing a written response.

Based on the foregoing, I conclude that Bray received written notice of his dismissal, evidence of the reasons for the dismissal through the receipt of the investigative report and the other documents, and an opportunity to rebut the charges. Thus, the Agency conformed to the statutory requirements.

However, even if the Agency did not conform to these requirements, such conduct would not require reversing the Agency's dismissal because the Commission's appeal process is a "de novo" hearing. As such, the Agency had the burden to establish facts representing cause for discipline by a preponderance of the evidence. See, Kelly v. Department of Children and Families, 16 FCSR 80, 81 (2001), citing Hitzing v. Department of Health and Rehabilitative Services, 12 FCSR ¶068 (1997); Chernaik v. Department of Health and Rehabilitative Services, 12 FCSR ¶109 (1997). In turn, Bray's presentation of his defense demonstrated that he received appropriate notice of the allegations and evidence against him prior to the hearing, and he received an opportunity to rebut the allegations and evidence at the hearing. Therefore, Bray's due process rights have not been violated.

CONCLUSIONS OF LAW

1. The Public Employees Relations Commission has jurisdiction of this case.

2. The Agency proved cause by a preponderance of the evidence to discipline Bray for a first occurrence of violating the Agency's computer security policy.

3. The Agency properly invoked and implemented the extraordinary provisions procedure pursuant to Section 110.227(5)(b), Florida Statutes.

RECOMMENDATION

I recommend that the Commission adopt the foregoing recommended order and DISMISS Bray's appeal.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within five business days after the recommended order is issued. See, §110.227(6), Fla. Stat.(2001); Fla. Admin. Code Rule 28-106.104 and 28-106.217(3). Parties should not expect to receive extensions of time to file exceptions except in the most compelling situations.

ENDNOTES

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[1] For continuity and stylistic preference, I incorporate the parties' stipulations into my findings of fact. References to the record are made to facilitate review by the Commission, but they are not necessarily the only support for any finding of fact. Transcript cites will be referred to by "T at" followed by the appropriate page number.

[2] Bray's and Rayner's versions of this conversation differed as to whether Bray indicated that he was currently in the market to purchase real estate. I have credited Bray's version because his memory of the conversation was clearer and more consistent with the unrebutted testimony that he neither asked to speak to Shugar nor requested that she call him.

[3] The unbecoming conduct charge also included an allegation of stalking resulting in the issuance of warrants and a temporary injunction against Bray. Other than the evidence regarding the alleged telephone call from Bray to Shugar, the Agency presented no additional evidence in support of this portion of its charge.

* * * * *

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

JOHN M. CAPERS,
Employee,

Case No. CS-2002-163
v.
Order Number: 02CS-
253

Issue Date: July 24, 2002

DEPARTMENT OF
CORRECTIONS,

Agency.
_____________________________/

Before Poole, Chair, and Varn, Commissioner.

APPEARANCES

John M. Capers, Quincy, employee representing himself.

Mark Henderson, Tallahassee, attorney representing agency.

FINAL ORDER

The Agency suspended John M. Capers for fifteen days for alleged violation of state statute, rule, directive or policy statement; falsifying reports or records; and failure to follow oral and/or written instructions. Capers appealed to the Commission and a hearing was held before a hearing officer on June 24.

The hearing officer found that the Agency demonstrated cause to discipline Capers, a correctional officer, for failure to follow instructions and violation of statute, rule directive, or policy statement. However, he found that the Agency did not have cause to discipline Capers for falsification of forms or reports. The hearing officer concluded that Capers presented sufficient evidence to demonstrate that the disciplinary penalty imposed by the Agency was too severe, and he recommended mitigating the disciplinary penalty to a five-day suspension.

Neither party excepted to the hearing officer's order. A transcript of the hearing has not been filed with the Commission.

We accept the hearing officer's findings of fact. Furthermore, we agree with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations. Accordingly, the hearing officer's recommended order is ADOPTED as the Commission's final order. §120.57(1)(I), Fla. Stat. (2001). Capers' appeal is SUSTAINED in part.

The Agency is directed to provide Capers with back pay and benefits for that period of the suspension in excess of five days, less any compensation and earnings that he would not have received had he not been suspended for more than five days. The back pay award shall include interest at the lawful rate. If informal efforts to obtain satisfactory payment prove unsuccessful, either party may petition the Commission to direct issuance of a back pay statement (PERC form 18).[1] A petition or PERC form 18 must be received by the Commission within thirty days from the date of this order. In the event this order is appealed to a district court and affirmed, a petition or PERC form 18 must be filed within thirty days from the date of the court's mandate.

[appeal right paragraph deleted]

It is so ordered.

Kossuth, specially concurring.

Neither party filed a transcript of the hearing with the Commission. In the absence of a transcript, we are compelled to accept the hearing officer's findings of fact and his recommended penalty. See, §120.57(1)(I), Fla. Stat. (2001); Roberts v. Florida Department of Corrections, 690 So.2d 1383 (Fla.1st DCA 1997). Accordingly, I concur with the result reached by the majority.

However, the Agency's practice of allowing employees to enter an event into the control room log fifteen or twenty before it occurs, but prohibiting the entry of the same information an hour or more before it occurs, appears to be arbitrary. This is especially true if the Agency allows its employees to change the entry if the anticipated event does not occur. In addition, I have reservations about the severity of the Agency's selected disciplinary penalty. Capers' conduct was not serious, he is a good employee without a prior disciplinary record, and there is evidence that he was treated in a disparate manner. Capers was trying to be efficient and save time; this does not warrant either a fifteen-day suspension or a five-day suspension. In my view, the Agency should have counseled Capers or, at most, given him a written reprimand.

ENDNOTE

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[1] A copy of this form is enclosed.

HEARING OFFICER'S RECOMMENDED ORDER – CORRECTIONAL OFFICER

July 3, 2002

Showalter, Hearing Officer.

On May 7, 2002, John M. Capers filed an appeal of his fifteen-day suspension from the Department of Corrections (Agency) for violation of state statute, rule, directive or policy statement; falsifying reports or records; and failure to follow oral and/or written instructions. The Commission appointed the undersigned as hearing officer and directed that an evidentiary hearing be conducted.

On June 24, an evidentiary hearing was conducted in Bristol. All parties were provided with an opportunity to appear, present evidence, examine witnesses, and fully participate in the hearing. Both parties timely filed post-hearing documents. A transcript was not filed.

STIPULATION

At the time of his fifteen-day suspension, Capers was a permanent career service system employee with the job title of Correctional Officer. He began working for the Agency in May 1997.

FINDINGS OF FACT

On July 12, 2001, Capers was working in the control room at Liberty Correctional Institution (LCI) on the first shift from 12:00 a.m. to 8:00 a.m. One of Caper's duties was to maintain the control room log on the computer. The log is designed to be a running account of events which occur at LCI, and the information is to be entered as it occurs. If it becomes very busy, it is permissible for the control room officer to write entries on a pad of paper and later transfer them to the computer. It is also permissible to make late entries in the log. However, except in very limited circumstances, it is not permissible to enter an event in the log prior to it occurring.

At approximately 6:20 a.m. on July 12, LCI Warden Charles Germany entered the control room and examined the log on the computer. He discovered that Capers had already noted in the log that at 7:30 a.m. Captain Holt had replaced Captain Mercer. Capers did not enter in the log any other event and time which had not yet occurred.

When Warden Germany saw that the log referenced an event which had not yet occurred, he printed out the log and asked Capers why the log had been filled out in this manner. Capers told Germany that he had to go back and change anything that was wrong.

Germany gave the printed copy of the log to Captain Mercer with the instruction that he discuss it with Capers and write an incident report. Mercer complied with Germany's instructions. However, the printed log that Germany gave to Mercer has been lost.

The captain in charge of the first shift is scheduled to leave work at 7:30 a.m. One of the duties he must perform prior to leaving LCI is to review the control room log and sign off on it. Typically, the captain will come to the control room between 7:15 a.m. 7:20 a.m. in order to complete his paperwork prior to leaving at 7:30 a.m. Therefore, the common practice for the control room officers is to complete the log when the captain comes to the control room, including indicating that the captain of the oncoming shift has replaced the captain of the outgoing shift. This entry is generally placed in the log at approximately 7:15 a.m. or 7:20 a.m. even though it indicates that the change occurred at 7:30 a.m. It is not a common practice for control room officers to place an entry in the log at approximately 6:00 a.m. indicating that the change in captains occurred at 7:30 a.m.

The October 17, 2000, post orders for control room officers states that "a very important function of the control room is the documentation of all activities during the workday. All pertinent information is documented on the control room log, which serves as an official and permanent record of events."

Correctional Officer Sergeant Verna Lee received a five workday suspension in January 2002 for violation of state statute, rule, directive or policy statement; falsifying reports or records; and failure to follow oral and/or written instructions. Lee submitted a timesheet indicating that she had worked eight hours each day on May 26, 29 and 30, 2001, when in fact she had been on annual leave those days.

Jacqueline Solomon received a written reprimand in 1999 because she erroneously indicated in the training computer system that three individuals had completed eight hours of human diversity training when they had not. One of the charges against Solomon was falsification of reports and records.

1. Prior to this incident, Capers had not been disciplined by the Agency. He has been rated outstanding in his evaluations.

2. Florida Administrative Code Rule 33-208.002(4)(a) provides that "each employee shall keep himself physically fit, mentally alert, and shall perform his duties fairly and impartially and otherwise conduct himself both on-duty and off-duty so as to command the respect of fellow employees, persons on parole, probation or otherwise under his supervision, and the general public. Each employee's conduct shall be at all times consistent with the maintenance of proper security and welfare of the institution and of inmates, persons on parole, probation or otherwise under his supervision."

3. Florida Administrative Code Rule 33-208.002(13) provides that "no employee shall falsify reports or records."

4. Florida Administrative Code Rules 33-208.003(21) and (32) provide that an employee may be disciplined by a written reprimand, up to a thirty-day suspension, or dismissal for a first occurrence of falsification of forms or records and failure to follow oral or written instructions.

ISSUE

1. Whether the Agency had cause to discipline John M. Capers?

2. If the Agency had cause for discipline, whether a fifteen-day suspension was too severe?

ANALYSIS

The Agency has the burden to demonstrate by a preponderance of the evidence that it had cause to discipline Capers. See §110.227(1), Fla. Stat. (2001). The Agency is confined in its evidentiary presentation to the facts and allegations stated or reasonably implied in the disciplinary notices it gave to Capers. See Department of Natural Resources v. Sheffield, 420 So.2d 892 (Fla. 1st DCA 1982). If the Agency fails to prove the allegations that it has made against Capers, his appeal will be sustained.

The Agency has charged Capers with engaging in conduct which violates a state statute, rule, directive, or policy statement; falsifying reports or records, and failure to follow oral or written instructions. There is no dispute that Capers placed the 7:30 a.m. entry in the log prior to it occurring. However, contrary to the Agency's assertion, I find that no other entries were placed in the log early. The Agency, which has the burden of proving its allegation, could not produce the log which Warden Germany had printed off the computer at 6:20 a.m. on July 12. In addition, this incident occurred almost one year ago, and Germany and Mercer could not specifically identify any other entry which was entered in the log before it occurred. Capers denied any other entries were entered early. Moreover, based upon Capers' testimony and my review of the log (Agency

Exhibit 10), none of the other entries between 6:00 a.m. and 7:30 a.m. were events which occurred at precisely the same time each day and so were not amenable to being entered early.

I will first consider the falsification charge. In order to provide that Capers falsified the control room log, the Agency must show both that he placed false information in the log and knowingly supplied wrong information with the intent to mislead or defraud the Agency. See, Shaver v. Department of Corrections, 16 FCSR 24 (2001). Sometime before 6:15 a.m. on July 12, Capers noted in the control room log that at 7:30 a.m. Captain Holloway relieved Captain Mercer. Obviously, this event had not yet occurred at the time Capers noted it in the log. Thus, at the time he wrote the statement it was not true. Nevertheless, I do not consider Capers' conduct to be falsification because he did not attempt to mislead or defraud the Agency.

The event that Capers noted in the record, one captain replacing another captain, is an event which generally happens every day on the first shift at 7:30 a.m. Apparently, Capers placed this event in the log prior to it occurring in order to save time later in the shift. Capers indicated to Warden Germany and Captain Mercer that if this event did not happen as he indicated, he would have changed it. Thus, this is not a situation where Capers was trying to cover up an error or mislead the Agency. Although I agree with the Agency that this is not a proper way for Capers to save time, I do not conclude that he intended to mislead or defraud the Agency by making this entry in the log prior to it occurring. Thus, the Agency did not have cause for falsification of forms or reports. See, Brown v. Department of Corrections, 16 FCSR 59 (2001).

Notwithstanding my determination that Capers' conduct does not constitute falsification, I conclude that he violated Agency policy and failed to follow instructions by making this entry when he did. Virtually every witness testified that control room officers are required to record events in the control room log as they occur, with the exception of the entry that one captain replaced another captain at the change of shift. [1] This entry is placed in the log a few minutes before the change actually occurs so that the outgoing captain can read and approve the log prior to the end of the shift without incurring any overtime. This practice that was commonly followed by control room officers is very different in terms of time than what Capers did here. He filled in this entry at least one hour prior to it occurring, and it could have been several hours before. Capers failed to follow the well known policy, thus, the Agency had cause to discipline him.

Even though the Agency had cause for discipline, Capers' fifteen-day suspension may be mitigated pursuant to Section 110.227(6)(c), Florida Statutes (2001), because of his status as a correctional officer. Although the legislature has not specified any criteria to apply in considering an employee's request for mitigation of discipline, in Sanders v. Department of Corrections, 16 FCSR 495 (2001), the Commission addressed its mitigation authority pursuant to the "Service First" statutory amendments. While it is unnecessary to repeat the Commission's holding in Sanders, I note that the Commission indicated that the four prior statutory mitigation criteria retained their validity as mitigating circumstances but that these mitigators are no longer delimited by their prior statutory definitions.

Capers has been employed by the Agency for approximately five years, and in that time he has never been disciplined. In his evaluations, he has received outstanding ratings. Thus, I conclude that Capers' employment record supports mitigation of his fifteen-day suspension.

Capers' failure to follow Agency policy by placing an early entry in the log is serious, although not as serious as if he had intentionally falsified the control room log. His misconduct did not arise from a desire to mislead the Agency, but rather to perform his duties more quickly. Thus, I conclude this factor neutral as it relates to mitigation.

Capers also contends that he was treated differently than other Agency employees who engaged in similar misconduct. Correctional Officer Sergeant Verna Lee received a five workday suspension for violating the same disciplinary standards that the Agency alleged Capers violated. Lee indicated in her timesheet that she worked three days when she was actually on annual leave.

For this type of offense, I do not believe that it matters that Lee is a Sergeant and Capers is a correctional officer because both are required to follow Agency policies and procedures. Thus, they are similarly situated. Both also engaged in similar misconduct by failing to properly follow Agency policies in completing documentation.

I disagree with the Agency that it is appropriate for Lee to receive less discipline because her misconduct is less serious than Capers' misconduct. First, Lee, unlike Capers, actually falsified her document. Moreover, the control room log and an employee's timesheet are vital documents the Agency relies on every day. While a timesheet may not directly relate to the security of the institution, the Agency must be able to rely on the accuracy of both documents. Thus, the difference in the documents is not a basis upon which to discipline someone significantly more harshly.

Jacqueline Solomon received a written reprimand for erroneously indicating that three individuals had completed a training session. Although training records are important, I agree with the Agency that they are not as important as the control room log and could justify some difference in treatment. However, Solomon also engaged in more serious misconduct because she falsified her records, unlike Capers. Thus, this is evidence of disparate treatment.

Upon consideration, I conclude that Capers has presented sufficient evidence to demonstrate that the disciplinary penalty imposed by the Agency was too severe. Capers is a very good employee with no prior discipline. In addition, the Lee and the Solomon cases establish disparate treatment, although the Lee case is much closer to Capers' situation. Therefore, I recommend that Capers' discipline be reduced to a five-day suspension.

CONCLUSIONS OF LAW

1. The Agency had cause to discipline Capers for failure to follow instructions and violation of a statute, rule, directive, or policy statement.

2. The Agency did not have cause to discipline Capers for falsification of reports or records.

3. Capers' fifteen-day suspension should be mitigated to a five-day suspension.

4. Capers is entitled to ten days of back pay.

RECOMMENDATION

I recommend that the Commission ADOPT the foregoing recommended order and SUSTAIN in part Capers' appeal.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within five business days after the recommended order is issued. See §110.227(6), Fla. Stat. (2001); Fla. Admin. Code Rule 28-106.104 and 28-106.217(3). The Commission may not change the findings of fact or mitigation recommendation (if any) in this order without first reviewing an official transcript of the hearing. Any party who desires the Commission to review the transcript must file one along with the exceptions. Alternatively, the Commission will consider a motion for a brief extension of time to file a transcript if the motion is filed along with the exceptions. Parties should not expect to receive extensions of time to file exceptions except in the most compelling situations.

ENDNOTE

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[1] Capers and his wife, who is a correctional officer, were the only witnesses who testified that it was proper to place other types of entries in the log well before they actually occurred. Because of their obvious interest in the outcome of this case, I have not relied on their testimony on this point.

* * * * *

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

CARRIER RECTOR,

Employee,

v.

DEPARTMENT OF CORRECTIONS,

Agency.

Case No. CS-2001-279
Order Number:01CS-452
Issue Date: October 31, 2001

_____________________________/

Before Poole, Chair, Jackson and Kossuth, Jr., Commissioners.

APPEARANCES

Thomas A. Klein, Tallahassee, attorney for employee.

R. Beth Atchison, Tallahassee, attorney for agency.

FINAL ORDER

On July 27, 2001, Correctional Officer Sergeant Carrier Rector was dismissed by the Department of Corrections (Agency) for alleged violation of a state statute, rule, directive or policy statement; conduct unbecoming a public employee; violence and/or fighting with other employees; and failure to follow oral or written instructions. A hearing was conducted before Commission-appointed hearing officer on September 18.

On October 2, the hearing officer issued his recommended order, concluding that the Agency had cause to discipline Rector for conduct unbecoming a public employee and willful violation of a statute and Agency rules when she pushed Correctional Officer Ozella Whitlock and, subsequently, pled guilty to a charge of misdemeanor battery. The hearing officer also concluded that mitigation of Rector's discipline to a lesser penalty was not warranted. Rector filed two exceptions to the recommended order. She also requested, and was granted, an extension of time to file a transcript. The transcript was filed after the extended filing period granted by the Commission. However, in light of Rector's explanation that unbeknownst to her the court reporter defaulted on a promise to file the transcript by the deadline, we accept the late-filed transcript.

We have carefully reviewed the entire record in this case, including the transcript of the evidentiary hearing. Based on that review we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in proceedings that satisfied the essential requirements of law. Therefore, we adopt the hearing officer's findings of fact. §120.57(1)(1), Fla. Stat. (2001).

In her first exception, Rector contends that the hearing officer improperly failed to compare the Agency's treatment of her with its treatment of other similarly situated employees. The Commission has recently approved consideration of disparate treatment as a mitigating circumstance under the Service First statutory amendments. See, Sanders v. Department of Corrections, Case No. CS-2001-269 (Fla. PERC Oct. 10, 2001). In fact, the hearing officer in this case did consider the treatment of other employees who, like Rector, pushed or struck another employee in the workplace. However, he did not find these cases to evince disparate treatment.

Two of the comparison employees considered by the hearing officer received suspensions pursuant to settlement agreements, and the hearing officer correctly found that discipline imposed pursuant to a settlement agreement may not be used as evidence of disparate treatment. The other comparison employee, Sergeant Frank Anderson received a three-day suspension for pushing a subordinate officer. However, unlike Rector, Anderson was not criminally charged for his conduct. We join in the hearing officer's view that this factor distinguishes Rector's conduct from that of Anderson sufficiently to justify the difference in their treatment. We recognize that the decision to prosecute was made by Rector's victim, who provoked the altercation, and

Anderson's avoidance of criminal charges was fortuitous. However, the fact remains that Rector's conduct led to a more public scrutiny of her conduct as she entered her plea and served her sentence.

In the same exception, Rector asserts that the Agency treated her disparately by failing to refer her to its Batterer's Intervention Program (BIP). The hearing officer rejected this argument upon determining that the Agency's BIP is generally designed for employees who have battered a spouse, significant other, or family member, not for an employee who batters a co-worker with whom she has no relationship. Rector argues that the record does not support this conclusion. We disagree.

Although the definition of domestic violence that Rector cites as the basis for her argument that the BIP covers her situation is indeed very inclusive, it is clear from a reading of the entire program description that it is intended to address incidents of battering among persons in intimate relationships. Further, although Rector asserts that her battery was domestic violence because the victim and provocateur was the new girlfriend of Captain Jerome Reaves with whom Rector had been having an affair and by whom she was pregnant, Rector did not disclose this relationship to the Agency. An employee cannot withhold information pertinent to her discipline from an agency and then later be heard to complain that she should have been treated differently in consideration of those undisclosed circumstances. For these reasons, Rector's first exception is denied.

Rector's second exception contends that the hearing officer erred in failing to recommend that Rector's dismissal be mitigated to a lesser discipline. Rector cites a number of circumstances that she believes warrant mitigation. In essence, those circumstances are the hormonal and emotional mood swings of pregnancy and the provocation carried out by Reaves and Whitlock. Even if we were to accept that the hormonal changes of pregnancy is a circumstance that is truly mitigating in nature, there is insufficient evidence in this record to establish the extent of this condition in Rector's case or to tie those fluctuations causally to her pushing of Whitlock. Thus, we conclude that this proposed mitigating circumstance was not proven.

It is apparent from this record that Rector was subjected to a concerted program of harassment and intimidation by Reaves in an effort to cause her to terminate her pregnancy. Whitlock, as Reaves' new girlfriend, participated in this harassment by taunting Rector with her new status, calling Rector a bitch and a whore, and calling Rector's young daughter an "ugly fat ass bastard." When Whitlock delivered this final insult she and Reaves were standing together near Rector, and Reaves was taunting Rector with the presence of his new girlfriend. In response, Rector pushed Whitlock. Although it is true that mere words are usually not found to be sufficient provocation to allow mitigation of a use of force, the words in this case take on increased significance as a part of a concerted pattern of harassment to get Rector to terminate her pregnancy. Under the facts of this case, we find that the provocation by Whitlock, compounded by Reaves ongoing threats and harassment, is a mitigating circumstance that is entitled to significant weight. Thus, we grant Rector's second exception in part.

Further, we conclude, as did the hearing officer, that Rector's employment record of eleven years is a mitigating circumstance that is also entitled to some weight. Additionally, the fact that Rector has never previously been disciplined during her eleven-year tenure is a mitigating circumstance of some weight.

Finally, we consider the seriousness of Rector's offense. She pushed another officer, who then fell to her hands and knees. This act did not result in injury to the other officer. The incident occurred in the administration building, not in the presence of inmates. Both the minor amount of force utilized and the fact that the pushing did not occur in an area where it might jeopardize security limit the seriousness of Rector's conduct. Further, there is no evidence that Rector's criminal plea has had any adverse effect upon her performance of her duties or the Agency's ability to carry out its mission. We find this limited seriousness to be a mitigating factor that is entitled to some weight in the determination of whether to reduce Rector's dismissal.

The sole aggravating factor noted is Rector's status as a correctional officer and supervisor. Law enforcement officers and their supervisors are held to a higher standard than other employees. This circumstance is entitled to some weight.

In sum, we have found three mitigating factors entitled to some weight and one mitigating circumstance entitled to significant weight. In contrast, we have found only a single aggravating circumstance entitled to some weight. On balance, we conclude that reduction of Rector's dismissal to a lesser discipline is warranted. Upon consideration of all of these circumstances, a thirty-day suspension appears to be an appropriate penalty for the conduct proven.

Therefore, we adopt the hearing officer's analysis of the dispositive legal issues and conclusion of law, as modified by this order. Carrie Rector's appeal is sustained in part, and her dismissal is mitigated to a thirty-day suspension.

The Agency is ordered to reinstate Rector to her former position or a position with the same degree of authority as her former position. The Agency is directed to provide Rector with back pay and benefits for that period of time that she has been dismissed in excess of thirty days, less any compensation and earnings that she would not have received had her employment with the Agency not been interrupted for more than thirty days. The back pay award shall include interest at the lawful rate. If informal efforts to obtain satisfactory payment prove unsuccessful, either party may petition the Commission to direct issuance of a back pay statement (PERC Form 18).[1] A petition or PERC Form 18 must be received by the Commission within thirty days from the date of this order. In the event this order is appealed to a district court and affirmed, a petition or PERC Form 18 must be filed within thirty days from the date of the court's mandate.

[appeal right paragraph is deleted]

It is so ordered.

ENDNOTE

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[1] A copy of this form is attached.

HEARING OFFICER'S RECOMMENDED ORDER – CORRECTIONS

October 2, 2001

Showalter, Hearing Officer.

On August 7, 2001, Carrie Rector filed an appeal of her dismissal from the Department of Corrections (Agency) for violation of a state statute, rule, directive, or policy statement; conduct unbecoming a public employee; violence and/or fighting with other employees; willful violation of rules; and failure to follow oral or written instructions. The case was assigned to the undersigned hearing officer and a hearing was scheduled.

On September 18, 2001, after due notice, a telephone evidentiary hearing was conducted between Tallahassee and Arcadia. All parties were provided with an opportunity to appear, present evidence, examine witnesses, and fully participate in the hearing. Both parties timely filed proposed recommended orders. A transcript was not filed.

FINDINGS OF FACT[1]

1. The Commission has jurisdiction of this case.

2. At all times pertinent to this appeal, Rector was a permanent career service employee and she held the job title of correctional officer sergeant.

3. Rector began working for the Agency on August 30, 1990, and was working at DeSoto Correctional Institution (DCI) at the time of her dismissal.

4. Prior to this incident, Rector had not been disciplined by the Agency.

5. Captain Jerome Reaves was the officer-in-charge of Rector's shift. Rector and Reaves began having an affair in approximately June 1999. Other Agency employees had heard rumors that they were having an affair. In late May 2000, Rector discovered she was pregnant by Reaves. Reaves was upset by this news because he was married. Thus, he urged Rector to have an abortion. When Rector refused, Reaves told her he would find another girlfriend and cause her work-related problems. Rector was very upset by Reaves' response.

6. On June 28, 2000, Reaves brought Officer Ozella Whitlock to Rector's dormitory to show Rector that Whitlock was his new girlfriend. Rector then telephoned Whitlock prior to the shift on June 29 to attempt to resolve the situation with Reaves. However, nothing was resolved because Whitlock repeatedly called Rector a bitch and a whore.

7. On June 29, at approximately 11:55 p.m., Rector and Whitlock were standing near each other in

the hallway by Reaves' office. Whitlock called Rector's seven year old daughter an "ugly fat ass bastard." Rector then lost control and pushed Whitlock from behind causing her to fall to her knees. In response, Whitlock attempted to attack Rector. Other officers intervened and quelled the disturbance.

8. On March 7, 2001, Rector pled guilty to a charge of misdemeanor battery for pushing Whitlock and adjudication was withheld. She was sentenced to one year of probation, and required to perform fifty hours of community service, pay court and supervision costs, have no unauthorized contact with Whitlock, and complete a domestic violence intervention program.

9. On September 4, 2001, Rector was officially discharged from probation after she completed the court-ordered conditions.

10. The Agency's Batterer's Intervention Program (BIP) is generally designed for employees who have battered a spouse, significant other, or family member. The BIP is not intended to be used by an employee who batters a co-worker with whom she has no relationship. Rector was not given an opportunity to participate in the Agency's BIP prior to her dismissal.

11. On November 12, 1998, Correctional Officers Gary Barcomb and Gary Crites argued and fought with each other. Pursuant to predisciplinary settlement agreements, Barcomb and Crites received three-day suspensions for their misconduct. Neither pled guilty to a crime or was subject to criminal sanctions because of their misconduct.

12. In 1992, Correctional Officer II Frank Anderson received a three-day suspension after he shoved another officer and used profanity. Anderson did not plead guilty to a crime and was not subject to criminal sanctions because of his misconduct.

13. Florida Administrative Code Rule 33-208.001(4)(a) provides that "no administrator, warden, officer-in-charge, supervisor, or other employee shall knowingly permit any subordinate, inmate, or other person to, nor shall he, commit any act or engage in any conduct which would violate any state statute, rule, directive, or policy statement. The administration and enforcement of all such statutes, rules, directives, and policy statements, except as may be otherwise provided herein, shall be a basic responsibility of all administrators, wardens, officers-in-charge, and supervisors."

14. Florida Administrative Code Rule 33-208.002(4)(a) provides that "each employee shall keep himself physically fit, mentally alert, and shall perform his duties fairly and impartially and otherwise conduct himself both on-duty and off-duty so as to command the respect of fellow employees, persons on parole, probation or otherwise under his supervision, inmates and the general public. Each employee's conduct shall be at all times consistent with the maintenance of proper security and welfare of the institution and of inmates, persons on parole, probation or otherwise under his supervision."

15. Florida Administrative Code Rule 33-208.002(17) provides that "violence, fighting, horseplay, and threatening or interfering with other employees at any time on Department of Corrections' premises or at any other place, while on duty, will not be tolerated."

16. Florida Administrative Code Rules 33-208.003(22), (24), and (32) provide that a first occurrence of conduct unbecoming a public employee; willful violation of rules, regulations, directives, or policy statements; and failure to follow oral or written instructions, respectfully, may be punished by a written reprimand, up to thirty days suspension, or dismissal.

ISSUES

1. Whether the Agency had just cause to discipline Carrie Rector?

2. If the Agency had just cause for discipline, whether dismissal was too severe?

ANALYSIS

The Agency has the burden to demonstrate by a preponderance of the evidence that it had just cause to discipline Rector. See, §110.227(1), Fla. Stat. (2001). The Agency is confined in its evidentiary presentation to the facts and allegations stated or reasonably implied in the disciplinary notices it gave to Rector. See, Department of Natural Resources v. Sheffield, 420 So.2d 892 (Fla. 1st DCA 1982). If the Agency fails to prove the allegations it has made against Rector, her appeal will be sustained.

It is undisputed that Rector pushed Officer Ozella Whitlock from behind causing Whitlock to fall to her knees. As a result of this incident, Rector pled guilty to a charge of misdemeanor battery. Although adjudication was withheld, Rector was sentenced to one year of probation, and required to perform fifty hours of community service and pay certain administrative fees and fines.

Rector intentionally pushed Whitlock, thus she willfully violated the Agency's rule prohibiting fighting or violence on Agency premises while on duty. In addition, she violated a state statute as evidenced by her guilty plea to a misdemeanor battery charge. Moreover, a correctional officer who engages in criminal misconduct has engaged in unbecoming conduct. See, Harper v. Department of Corrections, 15 FCSR 182 (2000).[2] Thus, I conclude that the Agency had just cause to discipline Rector.

Even though the Agency had cause for discipline, Rector's dismissal may be mitigated pursuant to Section 110.227(6)(c), Florida Statutes, because of her status as a correctional officer. The legislature has not specified any criteria to apply in considering an employee's request for mitigation of discipline. Rector argues that there are several reasons why her discipline should be mitigated.

Rector was employed by the Agency for approximately eleven years. In that time, she attained the rank of sergeant and had never been disciplined.

Thus, I conclude that her employment record supports mitigation.

Rector also argues that mitigation is appropriate because she was provoked to push Whitlock. The Commission has recognized that provocation is a factor which can be considered for mitigation purposes. See, Rhodes v. Department of Corrections, 16 FCSR 9 (2001); Shuler v. Department of Health and Rehabilitative Services, 3 FCSR ¶051 (1988), aff'd, 538 So.2d 1256 (Fla. 1st DCA 1989).

Whitlock told Rector that her seven year old daughter was an "ugly fat ass bastard." At the time of the comment, Rector was pregnant with Captain Reaves' child. The insult was made even worse because it was uttered by the person who Reaves was flaunting as his new girlfriend in the place of Rector. Further, the insult was preceded by other instances of verbal abuse from Whitlock and Reaves.

Nevertheless, Rector's physical response to Whitlock's insult and the other statements by Reaves and Whitlock was inappropriate. See, Oliver v. Department of Health and Rehabilitative Services, 8 FCSR ¶058 (1993). An insult, such as the one uttered by Whitlock, and other derogatory comments, are not sufficient provocation to warrant a physical response, particularly in a correctional institution setting. It is important for a correctional officer to maintain her composure in the face of different types of behavior designed to cause her to lose control. See, e.g., Rhodes v. Department of Corrections, 16 FCSR 9 (2001). Although Rector was upset about the personal circumstances in her life and the verbal abuse directed at her, as a sergeant working in a correctional facility Rector should have controlled her emotions and refrained from pushing Whitlock. Thus, this factor does not support mitigation.

Rector next contends that she was treated differently than other Agency employees who engaged in similar misconduct. I reject Rector's claim of disparate treatment. First, the comparison employees offered to demonstrate disparate treatment must have engaged in similar misconduct. Here, the three employees cited by Rector only engaged in fights at work; they did not plead guilty to a criminal charge nor were they criminally sanctioned. Thus, their charged conduct was different.

In addition, two of the employees, Crites and Barcomb, received three-day suspensions pursuant to predisciplinary settlement agreements. The Commission has held that disciplinary action imposed pursuant to a settlement agreement may not be used as evidence of disparate treatment. See, Harper v. Department of Corrections, 15 FCSR 182 (2000); Turner v. Department of Corrections, 4 FCSR ¶002 (1989).[3]

I also reject Rector's claim that she was treated disparately because the Agency did not refer her to the BIP. The Agency was under no obligation to offer Rector the services of the BIP. By its terms, the BIP does not apply to a battery committed by one employee against another when the employees were not in, or had been in, some kind of personal relationship. Thus, there is no disparate treatment which supports mitigation of Rector's dismissal.

Upon consideration of Rector's mitigation arguments, I conclude that mitigation is not appropriate. Although Rector was a good employee for eleven years and had never been disciplined, she engaged in serious misconduct by pushing a co-worker to her knees without sufficient provocation and pleading guilty to a misdemeanor battery charge.

In response to Rector's push, Whitlock attempted to attack Rector. Other Agency employees then had to intervene to quell the disturbance. This type of disturbance in a correctional institution setting can potentially affect the safety and security of the institution and its employees.

Moreover, Rector's guilty plea to a misdemeanor battery charge is serious as it relates to her duties as a sergeant working at a correctional facility housing convicted felons. By committing a crime, she engaged in conduct similar to those persons she was guarding. I recommend that Rector's dismissal not be mitigated.

CONCLUSIONS OF LAW

1. The Agency had just cause to discipline Rector for conduct unbecoming a public employee and willful violation of a statute and Agency rules.

2. Rector's dismissal should not be mitigated.

RECOMMENDATION

I recommend that the Commission ADOPT the foregoing recommended order and DISMISS Rector's appeal.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within five business days after the recommended order is issued. See §110.227(6), Fla. Stat. (2001); Fla. Admin. Code Rule 28-106-104 and 28-106.217(3). The Commission may not change the findings of fact or mitigation recommendation (if any) in this order without first reviewing an official transcript of the hearing. Any party who desires the Commission to review the transcript must file one along with the exceptions. Alternatively, the Commission will consider a motion for a brief extension of time to file a transcript if the motion is filed along with the exceptions. Parties should not expect to receive extensions of time to file exceptions except in the most compelling situations.

ENDNOTES

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[1] To maintain context and consistency, the parties' stipulations are included in my findings of fact.

[2] The employee in Harper engaged in off-duty criminal misconduct. It is even more egregious when, as here, the crime is committed on-duty.

[3] Rector's argument that the Commission should recede from this case law must be resolved by the Commission.

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STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

ROBERT SANDERS

Employee, Case No. CS-2001-269
Order Number: 01CS-437
v. Issue Date: October 10, 2001

DEPARTMENT OF
CORRECTIONS,

Agency.

______________________________/

Before Poole, Chair, Jackson and Kossuth, Jr., Commissioners.

APPEARANCES

Sandra M. Sanders, Arcadia, attorney for employee.

J. Yvette Pressley, Tallahasse, attorney for agency.

FINAL ORDER

On July 27, 2001, Robert Sanders appealed his dismissal by the Department of Corrections (Agency) for allegedly violating numerous disciplinary standards. See Fla. Admin. Code Rule 33-208.001(4)(a); 33-208.002(1), (4)(a) and (6); and 33-208.003(10), (22), (24), and (32). The Agency alleged the following facts in its final action letter:

> Specifically, on April 30, 2001, offender Sandra L. Noyes, DC#H02820, advised

Correctional probation Senior Officer Marsha Browning that while she was assigned to your caseload, you stopped by her residence when her husband and a friend were drinking beer and working on a vehicle. Noyes indicated this visit took place sometime between October and December 2000. A review of your case notes show an entry on November 4, 2000, indicating a home contact where the subject's husband was attempting a break [sic] job on the subject's daughter and son-in-law's pickup truck. After a brief conversation with them, you prepared to leavce and jokingly said to the son-in-law, Wayne Luper, the next time you would bring some beer. By your own admission in a sworn, taped statement, you departed and returned a short time later with a six-pack of beer which you gave to them and left. Additionally, offender Lisa Mendoza, in an affidavit, indicated that you gave candy to her children in the lobby of the office when she came to report in. This was confirmed by you during the sworn, taped statement. You further admitted to giving stuffed animals or a bag of M&M's to the children of offenders in the community. The basis of the charge is contained in Inspector General's Investigation #01-50871. Copy was attached to the Predetermination Conference letter you received dated June 25, 2001.

On August 1, the Commission appointed a hearing officer to this case who scheduled an evidentiary hearing. After due notice, a hearing was conducted on August 22. On August 31, the hearing officer issued a recommended order concluding that Sanders engaged in conduct unbecoming a public employee by giving a six-pack of beer to Luper, who is Noyes-Campell's daughter's boyfriend, while on a work-related field visit to Noyes-Campbell at her property. However, he found no violation for Sanders' distribution of candy and stuffed animals to the children of probationers. He further concluded that Sanders' dismissal should not be mitigated.

On September 10, Sanders filed six exceptions to the hearing officer's recommended order. Sanders' exceptions are divided into numerous subsections. The Agency did not file exceptions. A transcript of the evidentiary hearing was filed with the Commission. On September 19, we remanded the case to the hearing officer to make factual findings regarding the disparity issue raised in Sanders' exceptions and to determine the effect, if any, of those new facts on his original recommendation.

On September 20, the hearing officer issued a supplemental recommended order in which he again concluded that Sanders' dismissal should not be mitigated. On September 27, Sanders filed two exceptions to the supplemental order, which included a motion to reopen the record. The Agency did not file exceptions to the supplemental order.

In exception 1a, Sanders contends that finding of fact 14, in which the hearing officer found that Sanders knew of Florida Administrative Code Rule 33-208.001(4)(a); 33-208.002(1),(4)(a) and (6); and 33-208.003(10), (22), (24), and (32), prior to engaging in the conduct with which he is charged, is not supported by competent substantial evidence. Specifically, Sanders contends that the rules for which he signed an acknowledgment of receipt were the predecessors to those now found in Rule 33-208. See Agency Exhibits 6 and 7. Sanders argues that the Agency failed to demonstrate that the predecessor rules he received were the same as those he was charged with violating.

The history of Rule 33-208 evinces that this rule was formerly designated as Rule 33-4. (Agency Exhibit 6) A review of the transcript reveals that Sanders did not object to admission of a copy of Rule 33-208 and the acknowledgments of receipt of rules, Agency exhibits 6 and 7, respectively. (T 20)[1] More significantly, Sanders did not assert at the hearing that a substantive difference existed between the current and predecessor rules, nor did he establish that he relied on any alleged difference in these rules in deciding whether to engage in the conduct for which he was disciplined.

In Barnes v. Department of Juvenile Justice, 14 FCSR 143 (1999), the employee did not object at the hearing to either the agency's failure to furnish him with a copy of its witness list or to his inability to interview the agency's witnesses prior to the hearing. Rather, the employee raised these matters in his post-hearing argument. The Commission agreed with the hearing officer that an employee waives an issue that he fails to timely raise at the hearing. Barnes, 14 FCSR at 145. Similarly, we conclude that Sanders waived the issue that the Agency's current and predecessor rules are substantively different, such that he was not on notice as to rules he was alleged to have violated, because he did not raise this issue until after the hearing. Accordingly, this exception is denied.

In exception 1b, Sanders objects to a scrivener's error in finding of fact 18. Our review indicates that the error actually exists in the last sentence of finding 17, in which the hearing officer states that Rule 33-208.003(32) refers to "a failure to follow rules or written instructions," rather than to "a failure to follow oral or written instructions." (emphasis added) The exception is granting and finding 17 is modified accordingly. The granting of this exception does not materially affect the resolution of this case. In exceptions 2a-2q, Sanders objects to the hearing officer's failure to make additional factual findings. The proposed findings in exceptions 2a-2c, 2e, 2h, 2i, 2p and 2q are unnecessary. The statements proposed in exceptions 2m and 2n are argument. The proposed statement in exception 2o is both argument and unnecessary. The substance of the proposed findings in exceptions 2d, 2f, 2g, 2j, 2k, and 2l are included in findings of fact 1, 4, 5, 7, and 11-13 and page 13 of the hearing officer's analysis. Therefore, the proposed findings are repetitive and cumulative. Accordingly, these exceptions are denied.

In exceptions 3a, 3b, and 3c, Sanders argues that the hearing officer improperly relied on Rule 33-208.002(27) in determining that Sanders engaged in unbecoming conduct, that the hearing officer violated

Sanders' due process rights and the prohibition against ex post facto laws by expanding the scope of the prohibited conduct, and that the hearing officer improperly concluded that Sanders brought disrespect upon himself and the Agency. In exception 4, Sanders argues that, even if he "technically" violated an Agency rule by giving beer to Luper, the hearing officer nonetheless erred in finding cause for dismissal where Sanders' violation was not willful.

In resolving these exceptions, we initially address the hearing officer's conclusion that Sanders engaged in unbecoming conduct and that the other rule violations with which Sanders was charged are subsumed within that charge. The Commission has consistently stated that unbecoming conduct is not a "catch-all" charge. See, Ford v. Department of Corrections, 7 FCSR ¶313 at 1144-1145 (1992); Weisbrod v. Florida Career Service Commission, 375 So.2d 1102 (Fla. 1st DCA 1979). Further, an agency may not charge an employee with unbecoming conduct when, as here, the behavior at issue is prohibited by a more specific rule provision. See, Lee v. Department of Health and Rehabilitative Services, 7 FCSR ¶214 (1992); Mathis v. Department of Corrections, 6 FCSR ¶122 (1991); Sheppard v. Department of Corrections, 2 FCSR ¶283 (1987) (remanded on other grounds). Neither may an agency charge an employee twice, under separate rule provisions, for the same conduct. See, Department of Transportation v. Career Service Commission, 366 So.2d 473 (Fla. 1st DCA 1979). However, a general charge of unbecoming conduct is subsumed by a more specific charge only when both charges had the same range of disciplinary penalties. Floyd v. Department of Juvenile Justice, 16 FCSR 422, 424-25 (2001).

Our review of the hearing officer's factual findings reveals that the conduct in which Sanders engaged is covered by the charge of willful violation of rules, regulations, directives, or policy statements. Moreover, this charge has the same range of disciplinary penalties as the unbecoming conduct charge. Thus, the willful violation charge, rather than the unbecoming conduct charge, is the proper disciplinary standard to apply to Sanders' conduct.

In determining whether Sanders violated this standard, we first note our disagreement with Sanders' assertion that the Agency's failure to include a reference to Florida Administrative Code Rule 33-208.002(27) in the final action letter is somehow fatal to its case, particularly when, as here, Sanders knew this rule existed before he engaged in the prohibited conduct. See Find of Fact 18; T 101-102; Agency Exhibit 12; Employee Exhibit 2. Rule 33-208.002(27) states:

> Employees shall maintain a professional relationship with all persons in the custody or under the supervision of the [Agency], and their immediate families or visitors. No personal or business relationships are permitted. Marriage between employees and inmates is not permitted.

See Finding of Fact 19. This rule unambiguously placed Sanders on notice that he was required to maintain a professional relationship with the visitors of all persons in the Agency's custody or supervision.

The record reveals that on November 4, 2000, Noyes-Campbell was a probationer under the Agency's supervision, and Sanders was her probation officer. On this same date, Sanders, in his official capacity, visited Noyes-Campbell at her home. While there, Sanders came into contact with Luper, who was a visitor on Noyes-Campbell's property, and whom Sanders knew to be Noyes-Campbell's daughter's boyfriend. Notwithstanding this knowledge, Sanders asked Luper what type of beer he liked, drove to a local convenience store, purchased a six-pack of beer, returned to Noyes-Campbell's property, and gave it to Luper.

The gist of Sanders' argument is that purchasing alcoholic beverages and giving those beverages to a probationer's visitor on the probationer's property in the probationer's presence does not establish an unprofessional relationship under Rule 33-208.002(27). We find this argument disingenuous in view of the rule's clear prohibition of such conduct. Moreover, the evidence establishes that Sanders' behavior was willful because he had knowledge of the Agency's clear and unambiguous rule prohibiting his conduct, he deliberately engaged in the conduct, and there was no justifiable excuse for his conduct. See, Crawley v. Department of Highway Safety and Motor Vehicles, 616 So.2d 1061, 1063 (Fla. 1st DCA 1993). Accordingly, we conclude that Sanders willfully violated rules, regulations, directives, or policy statements. Hence exceptions 3a, 3b, 3c and 4 are denied.[2]

Exceptions 5a-5c to the recommended order and exception 1 to the supplemental recommended order raise issues regarding the severity of Sanders' disciplinary penalty. We take this occasion to address the Commission's mitigation authority pursuant to the recent "Service First" statutory amendments. Since the exception of its jurisdiction over career service appeals, the Commission has been vested with limited discretion to reduce the severity of an agency's selected discipline despite finding that there was just cause for disciplinary action. The Commission's discretion to reduce discipline was limited to consideration of four statutorily defined circumstances, generally described as seriousness of the offense, disparate treatment, previous employment and disciplinary record, and extraordinary circumstances. See §447.208(3)(d), Fla. Stat. (2000).

Chapter 2001-43, Section 38, Laws of Florida, divested the Commission of jurisdiction to reduce the agency's selected penalty in the appeals of most career service employees. However, the Commission retained the authority to reduce the penalty imposed in the case of law enforcement or correctional officers, firefighters, and professional health care providers "if it makes specific written findings of mitigation." §110.227(6)(c), Fla. Stat. (2001). Significantly, the amended statute no longer limits the Commission's mitigation discretion to consideration of the four statutory criteria. Thus, while the Commission's mitigation authority has been reduced to a narrower class of cases, its discretion to reduce the penalties in those cases over which it retains mitigation authority has been expanded.

In attempting to analyze our new mitigation authority it is not possible, or even desirable, for us to attempt to identify and define all potential mitigating circumstances here. This aspect of the Commission's jurisprudence will be developed and refined through consideration of the circumstances presented by the individual cases presented for resolution. We begin that task in this case by establishing guidelines and a mode of analysis for the mitigation issue.

As stated above, the Commission may only reduce the severity of a penalty if it makes written findings of mitigation. This ultimate finding of mitigation will necessarily rely on factual findings made by the appointed hearing officer in each case. Therefore, it will be the duty of the hearing officer in any case in which mitigation is at issue to make thorough findings, including credibility determinations, regarding all proffered mitigating circumstances. Analysis of the issues presented by the evidence of mitigating circumstances and a recommendation as to the ultimate finding of mitigation are also expected.

Two different standards are applicable in the Commission's review of a hearing officer's mitigation findings and conclusions. The question of whether a circumstance is truly mitigating in nature is a question of law subject to de novo review the by the Commission. However, a hearing officer's determination of whether a mitigating circumstance has been established by the evidence is a question of fact that, like all questions of fact, is reviewed only to determine whether it is supported by competent substantial evidence received in a proceeding that satisfies the essential requirements of law. Cf. Blanco v. State, 706 So.2d 7, 10 (Fla. 1997) (standards of review in determination of mitigating circumstances in death penalty cases). Further, because the legislature vested the Commission with the authority to make the ultimate mitigation determination, the ultimate authority to assess the weight assigned to a mitigating circumstance in a particular appeal rests with the Commission. Thus, this determination will be subject to de novo review.

In approaching the issue of mitigation, we adopt an analysis that considers both circumstances that are mitigating in nature and those that are aggravating in nature. Only through consideration of both of these countervailing influences can we fairly judge whether a penalty is too severe under the circumstances of an individual employee's case. A proper analysis will first examine the proposed mitigating circumstances to determine whether they are truly mitigating in nature, whether they are established by the evidence, and what weight each circumstance should be accorded. In turn, a like scrutiny must be afforded any circumstances that would balance against the significance of any mitigating circumstances.[3] Finally, the weight of the proven mitigators must be balanced against the weight of the proven aggravators to arrive at the ultimate finding of whether mitigation is warranted. Of course, this is not an exact mathematical operation; but rather, an analytic operation that requires the exercise of judgment and discretion. The Commission's objective is to delineate a standard mode of analysis which will promote consistency in the evolving case law.

We turn now to the question of what is a mitigating circumstance. We find guidance in the Florida Supreme Court's definition of mitigating circumstances in the context of death penalty cases. See, Campbell v. State, 571 So.2d 415, 419 at n. 4 (Fla. 1990). Adapting that definition to the present context, we define a mitigating circumstance broadly as an employee's record and any aspect of the circumstances of the offense that reasonably may serve as a basis for imposing a less severe penalty. Conversely, we define an aggravating circumstance as an employee's record and any aspect of the circumstances of the offense that reasonably may serve as a basis for imposing a more severe penalty within the range of possible penalties, not to exceed the Agency's chosen penalty.

While we will not at this juncture attempt to catalog the body of potential mitigators and aggravators, we note that the four statutory mitigation criteria that the Commission has been applying for the past fifteen years retain their validity as mitigating circumstances despite the statutory amendments. Seriousness of the proven conduct, disparate treatment, employment record, and extraordinary circumstances may be mitigators in an appropriate case. However, these mitigators are no longer delimited by their prior statutory definitions. Thus, in looking to Commission precedent applying these mitigators, it is important to discern whether a particular ruling or analysis was dictated by construction of some aspect of a now-repealed statutory definition. Where this is the case, that precedent is of no value unless the Commission has adopted that construction to control application of that mitigator under the Service First amendments. With this cautionary note, we turn to the mitigators at issue in the case at bar, all of which were also available under the prior statute: Disparate treatment, employment and disciplinary record, and seriousness of the offense.

Disparate Treatment

Perhaps none of the four statutory mitigation criteria were so shaped by their definition as that of disparate treatment. Based on its interpretation of that definition, the Commission placed upon the appealing employee seeking to establish disparate treatment the initial burden to prove that a similarly situated co-worker had engaged in comparable conduct yet been treated differently than the employee. Once this showing was made, the burden shifted to the agency to show that the difference in treatment was warranted. This shifting burden of proof and the concomitant requirement that the comparison employee be similarly situated to the appealing employee were developed in Lawrence v. Department of Health and Rehabilitative Services, 11 FCSR ¶292 (1996), recon. denied, 12 FCSR ¶099 (1997), aff'd, 708 So.2d 279 (Fla. 3rd DCA 1998), and its progeny. We recede from Lawrence, as that ruling is no longer viable following the Service First amendments.

Rather, we hold that an appealing employee may establish a prima facie showing of disparate treatment by proving only that another employee engaged in comparable conduct yet received different treatment. Upon this showing, the burden will shift to the agency to establish compelling facts justifying the distinction between the employees. While we will no longer require the appealing employee to prove disparate treatment through comparison to a comparable employee, we note that differences in job duties and rank may justify the difference in treatment between employees, so as to defeat a showing of disparate treatment or reduce the weight of that mitigator.

In exception 5b, Sanders contends that the hearing officer erred in failing to conclude that the circumstances involving Correctional Probation Senior Officer Marsha Browning and Probation Officers Cerfornia Reed and Sabrenia Lee proved that he had been treated disparately.[4] In exception 1 to the supplemental recommended order, Sanders contends that the hearing officer erred in concluding that Reed was not similarly situated to him for purposes of disparity.

The hearing officer found that, during Browning's previous employment with the Agency as a correctional officer, the Agency dismissed her for engaging in an inappropriate officer/inmate relationship. She was subsequently rehired in a clerical position and allowed to work her way back up into the ranks of correctional probation officers. Since Browning was dismissed, her treatment does not establish that Sanders has been treated disparately.

The hearing officer found that Lee was arrested for burglary, was not prosecuted for the burglary, and was not dismissed by the Agency. The hearing officer also found that the testimony regarding Reed and the circumstances of her arrest for battery, the ultimate resolution of that charge, and the discipline imposed, if any, are based on hearsay evidence. See Supplemental

Recommended Order at 2, fn. 1; T 68-69, 72. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is insufficient in itself to support a finding unless it would be admissible over objection in civil actions. §120.57(c), Fla. Stat. (2001).

The evidence presented by Sanders regarding Reed and Lee is insufficient to establish disparity. Even if the facts alleged by Sanders relative to Reed and Lee had been proven by substantial competent evidence, neither Reed nor Lee engaged in conduct similar to that of Sanders. Accordingly, exception 5b and exception 1 to the supplemental recommended order are denied.

Employment and Disciplinary Records

The length and quality of an employee's employment record, if favorable, are mitigators. Likewise, a spotless disciplinary record is a mitigator. However, we view an employee's prior discipline as an aggravator to be assigned a weight apart from consideration of the employment record and balanced against any proven mitigators in the ultimate finding of mitigation.

In exception 5c, Sanders argues that the hearing officer erred in concluding that his prior employment and disciplinary records do not warrant mitigation. At the time of his dismissal, Sanders had been employed by the Agency for approximately twenty-five years. See Finding of Fact 1. During that time, he received letters of commendation concerning prior acts of heroism, promotions, and one suspension in November

1990. (Hearing Officer's Recommended Order at 13) This long record of commendable service is entitled to significant weight in favor of mitigation. Accordingly, exception 5c is granted.

We consider also that Sanders has a prior disciplinary record of a three-day suspension in 1990. While this is an aggravating factor, its significance is diminished by its distance in time and the fact that it is the only discipline in a lengthy career. Thus, we accord this aggravator only slight weight against mitigation.

Seriousness

The fact that a particular offense is not particularly serious in relation to the duties and responsibilities of the offending employee's position remains a valid basis for mitigating discipline. Conversely, the fact that the offense is particularly serious in relation to those duties and responsibilities will serve as an aggravator.

In exception 5a, Sanders argues that giving a six-pack of beer to a probationer's visitor on one occasion was not serious as it relates to his duties and responsibilities. We disagree. It is evident that the Agency has concluded that it is important for employees to maintain a professional relationship with persons under its supervision and control, as well as with their families and visitors. Here, Sanders' conduct had the appearance of showing favoritism to a probationer by the manner in which he treated the probationer's visitor. The probationer herself interpreted Sanders' conduct as establishing a bond.

See Findings of Fact 11-12; T 32-34. The fact that no further harm occurred in this instance does not render the conduct less serious since, in engaging in this unprofessional conduct, Sanders left himself open to the risk that the probationer would use Sanders' conduct against him in a manner that would prevent Sanders from effectively supervising the probationer. E.g., Incardona v. Department of Corrections, 3 FCSR ¶013 (1988). For these reasons, exception 5a is denied.

However, while the seriousness of Sanders' conduct does not favor mitigation, we also note that his conduct was not particularly egregious or damaging to the Agency, so as to weigh against mitigation as an aggravator.

Sanders raises lack of training as an additional ground for mitigation. Where it is proven that the conduct for which an employee was disciplined resulted from a lack of training, this fact may be a mitigator in an appropriate case. However, this is not that case. First, we note that Sanders did not prove that he suffered from a lack of training. Indeed, in his second exception to the supplemental recommended order, Sanders seeks to provide additional evidence on the issue of his training. Specifically, Sanders requests that we reopen the record to consider matters contained in paragraph three of a memorandum of agreement between the Agency and the Florida Police Benevolent Association.

The Commission considers the following factors in determining whether to reopen an evidentiary record:

> (1) Whether the additional evidence is newly discovered and was not available or discoverable with due diligence prior to the hearing;
> (2) Whether the motion is opposed;
> (3) Whether the delay would result from granting the motion; and
> (4) What impact, if any, and the admission of such evidence would have on the material factual determinations made by the hearing officer.

See, Aihie v. Department of Juvenile Justice, FCSR 276 (2001), citing Gordon v. Department of Health and Rehabilitative Services; 8 FCSR ¶228 (1993); Brunn v. Department of Revenue, 3 FCSR ¶150 (1988), per curiam aff'd, 545 So.2d 1370 (Fla. 1st DCA 1989).

Sanders asserts that the memorandum is newly discovered and that he was not aware of its existence at the time of the hearing. He does not indicate how he discovered this document. A review of the document reveals that it was signed by the parties on March 8 and 9, 2000, well before the hearing in this case. Sanders appears to be affected by the matters contained therein and, therefore, knew or should have known about the existence of this memorandum. Moreover, this type of memorandum is of a kind which would have been discoverable with due diligence by simply making an inquiry to the union which represents correctional personnel.

Sanders does not indicate whether the Agency opposes his motion. The granting of this motion would result in delay, as it would require a second remand for the hearing officer's consideration of the memorandum and possibly a supplemental hearing.

More significantly, the admission of this memorandum into the record would not substantively impact the material factual determinations made by the hearing officer. Paragraph three of the memorandum states, in pertinent part:

> At the end of the training period an officer who is not performing the new duties and responsibilities at a satisfactory performance level shall be offered the right to elect one of the following alternatives: (a) continued remedial training for an additional four (4) week period, or (b) transfer to the next available classification officer position without loss of pay or benefits excluding special risk retirement . . . .

This paragraph addresses training provided to an employee who is not meeting performance standards, rather than an employee such as Sanders who has violated disciplinary standards. Thus, we conclude that reopening the record to receive this document is not warranted.

Further, reopening the record for this document would serve no purpose, inasmuch as we reject the contention that Sanders' conduct was the result of inadequate training. While there may be circumstances when reasonable persons would dispute whether certain conduct is unprofessional, providing alcoholic beverages to a probationer's visitor during a supervisory visit, is not one of them. For these reasons, the motion to reopen the record and exception 2 to the supplemental recommended order are denied.

In sum, the evidence establishes one mitigator, employment record, that weighs heavily in favor of mitigation, and one aggravating circumstance, disciplinary record, that provides some slight weight against mitigation. On balance, we find that mitigation of Sanders' dismissal to a penalty less than dismissal is warranted. Upon consideration, we conclude that a sixty-day suspension is an appropriate penalty under the circumstances of this case.

In exception 6, Sanders objects to the hearing officer's failure to recommend that he be awarded attorney's fees and costs. The Commission is no longer authorized to award attorney's fees and costs in career service appeals. See, §447.208, Fla. Stat. (2001). Accordingly, this exception is denied.

For completeness, we address an additional argument that Sanders includes in portions 4, 5a, and 6. Sanders contends that the Service First amendments should not apply in this case. Because the acts for which he was disciplined occurred in 2000. Sanders contends that the law in existence at the time must be applied to his case. Sanders cites the case of Department of Transportation v. James, 403 So.2d (1066) (Fla. 4th DCA 1981), in support of this proposition. We have previously concluded that the law that exists at the time an employee receives notice of his discipline governs because that notice triggers an employee's right to appeal to the Commission. See, e.g., Floyd v. Department of Juvenile Justice, 16 FCSR 422(2001); Schneider v. Department of Legal Affairs, Office of the Attorney General; 16 FCSR 379 (2001); Reese v. Department of Children and Families, 16 FCSR 369 (2001); Reese v. Department of Corrections, 16 FCSR 365 (2001).

Furthermore, upon review of these exceptions, we conclude that the issues they raise are moot. For example, in exception 4, Sanders argues that his charge should be analyzed as a willful violation of a rule, rather than merely as a violation of a rule. We agree and have analyzed Sanders' conduct as a willful violation charge because this is the charge that was contained in the Agency's final action letter. In exception 5a, Sanders asserts that the severity of his discipline should be analyzed under the statutory mitigation criteria that existed in 2000. We have analyzed the mitigation issues under the criteria proposed by Sanders in his exceptions because they are not in conflict with the current statute. See, §110.227(6)(c), Fla. Stat. (2001).

In exception 6, Sanders contends that he is entitled to an award of attorney's fees and costs under the statute that existed in 2000. Under that statute, Sanders would have been entitled to attorney's fees and costs only if he substantially prevailed in his appeal. See, Kelley v. PERC, 781 So.2d 1193 (Fla. 5th DCA 2001). Although we have determined that dismissal is too severe a penalty for Sanders' offense under the circumstances of this case, we have concluded that his conduct warrants a serious sanction. The sixty-day suspension that we are imposing is not so different from the penalty selected by the Agency that it can be said that Sanders has substantially prevailed in this appeal. Therefore, Sanders would not have been entitled to an award of fees or costs even under the statute as it existed in 2000. See, e.g., Ledlow v. Department of Corrections, 12 FCSR ¶053 (1997); Kennerly v. Department of Commerce, 11 FCSR ¶040 (1996). Accordingly, these portions of exceptions 4, 5a, and 6 are denied.

Upon review of the entire record, including the transcript of the evidentiary hearing, we conclude that the hearing officer's original and supplemental findings, as modified, are supported by competent substantial evidence received in a proceeding that complied with the essential requirements of law. See, §120.57(1)(1), Fla. Stat. (2001). We also agree with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations as modified and augmented by this order. Therefore, the hearing officer's recommended and supplemental recommended orders, as modified, are incorporated herein and ADOPTED as part of the Commission's final order. See, §120.57(1)(1), Fla. Stat. (2001). Accordingly, Sanders' appeal is SUSTAINED IN PART. Sanders shall be suspended without pay for sixty days. The Agency is ordered to reinstate Sanders to his former position or a position having the same degree of responsibility as his former position.

The Agency is directed to provide Sanders with back pay and benefits from the date of his dismissal until the date the Agency offers to reinstate him, less the period of his suspension and less any compensation and earnings which he would not have received had his employment with the Agency not been interrupted for more than sixty days. The back pay award shall include interest at the lawful rate. If informal efforts to obtain satisfactory payment prove unsuccessful, either party may petition the Commission to direct issuance of a back pay statement (PERC Form 18).[5] A petition or PERC Form 18 must be received by the Commission within thirty days from the date of this order. In the event this order is appealed to a district court and affirmed, a petition or PERC Form 18 must be filed within thirty days from the date of the court's mandate.

[appeal right paragraph deleted]

It is so ordered.

ENDNOTES

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[1] Citations of the transcript will be referred to by "T" followed by the appropriate page number.

[2] For this same reason, we deny exception 5d.

[3] These countervailing circumstances are analogous to the "aggravating circumstances" examined in death penalty cases, also, called "aggravators." While not adopting that body of case law, we adopt this terminology.

[4] This exception was the basis for remanding the case to the hearing officer.

[5] A copy of this form is enclosed.

* * * * *

SUPPLEMENTAL HEARING OFFICER'S RECOMMENDED ORDER

September 20, 2001

Ruby, Hearing Officer.

On September 19, 2001, the Commission remanded the instant case for consideration of mitigation in light of alleged disparate treatment by the Department of Corrections (Agency) in its dismissal of Robert M. Sanders.

SUPPLEMENTAL FINDINGS OF FACT

1. Marsha Browning, a probation officer at the Arcadia probation office, had previously been found to have had an inappropriate officer/inmate relationship while she was working for the Agency. However, this took place while Browning was a correctional officer and prior to her working as a probation officer. Browning was dismissed by the Agency for the offense and then subsequently rehired by the Agency. At the time of the rehire, Browning was hired by the Agency as a secretary and went to school to later become a probation officer. (T 66-68, 73)

2. Probation officer Cerfornia Reed was arrested for battery and placed on County probation while employed by the Agency as a classification officer. The evidence does not indicate whether the probation continued when Reed assumed duties with the Arcadia probation office (i.e., there was testimony from the Arcadia probation office supervisor that Reed "was seeking to have [the conviction] overturned because it would have affected her standards" before Reed started work at the Arcadia office). There is no evidence in any case that Reed had previously been punished as had Sanders. There is no evidence as to what, if any, punishment she received by the Agency at the time of

her alleged battery. There is no evidence that Reed's conduct occurred on duty.[1] (T 68-69, 72-73)

4. Probation officer Sabreina Lee was arrested for burglary while employed by the Agency and was not dismissed. The charges were nol prossed and Lee was not working in the Arcadia probation office at the time of the arrest. (T 70-71) There is no evidence to indicate that Lee was actually guilty of the offenses with which she had been charged or whether the Agency decided that a nol pros indicated that the arrest was unwarranted. (T 70-71)

ANALYSIS AND DISCUSSION

The Commission stated the standard of proof for disparate treatment in Lawrence v. Department of Health and Rehabilitative Services, 11 FCSR ¶292 (1996), recon. denied, 12 FCSR ¶099 (1997), aff'd, 708 So.2d 279 (Fla. 3rd DCA 1998) as follows:

> In [Bell v. Department of Health and Rehabilitative Services, 9 FCSR ¶137 (1994)], the Commission articulated a shifting burden of proof to be applied in cases where an appealing employee asserts the existence of disparate treatment. This shifting of burden was set forth as follows:
>
> > The employee asserting the existence of disparate treatment must establish a prima facie case by proof of action taken with respect to similar conduct by other

> employees. The burden of going forward with the evidence will then shift to the employer to demonstrate a legitimate reason for the differences in treatment of the employees, e.g. employee performance, length of service, prior discipline for the same or other offenses, distinctions in the circumstances of the misconduct. The burden will then shift again to the appealing employee to rebut the employer's case. This shifting burden will help the parties focus upon those particular aspects of a comparable situation which are alleged to justify treatment disparate from that afforded the appealing employee, while relieving appealing employees of the onerous burden of proving that comparisons are similar to themselves in every respect. Bell at563

We recede from [Bell v. Department of Health and Rehabilitative Services, 9 FCSR ¶137 (1994) insofar as it suggests that an appealing employee, in order to

> establish a prima facie case of disparate treatment, must merely show the existence of other agency employees who have been disciplined less severely for the same rule violation. Rather, the employee must initially show that a comparable employee, i.e., one whose job functions and responsibilities closely resemble those of the appealing employee, engaged in similar conduct and received lesser discipline. Thereafter, as enunciated in Bell, the burden of distinguishing the disciplinary cases shifts to the Agency.

Lawrence, 11 FCSR ¶292 at 1494-95 (1996), recon.denied, 12 FCSR ¶099 (1997), aff'd, 708 So.2d 279 (Fla. 3rd DCA 1998). Plainly put, Sanders has not shown that Browning, Reed and Lee were similarly situated or that they engaged in the same conduct and therefore Sanders has not met the foregoing standard to show disparate treatment.

The events that occurred concerning Browning, Reed and Lee were all events that occurred prior to their having worked for McCall as probation officers. Although Browning was a witness and could have testified concerning her prior indiscretion, Sanders chose not to examine Browning but to examine the supervisor of the Arcadia probation office, Terry McCall. McCall's testimony was largely hearsay as to Browning, Reed and Lee.

In the case of Browning, she had actually been discharged by the Agency for the alleged offense as a correctional officer. Although Browning was not allowed to return to work later, it was as a secretary and she then went to school to achieve the probation officer classification that she currently holds. Browning's discharge certainly does not indicate disparity.

In the cases of Reed and Lee, there is also no evidence of similar misconduct as that of Sanders while working as a probation officer. Further, in the case of Lee, who was solely arrested and not convicted of anything, an arrest alone is not misconduct. See, Barnes v. Department of Juvenile Justice, 16 FCSR 62, 64-65 (2001) and cases cited therein. Thus, in Lee's case, there is no evidence whatsoever of misconduct. Perhaps to the same effect, McCall testified that Reed informed her that Reed intended to somehow attack her battery conviction before Reed started work as a probation officer for McCall.

At best, the evidence is somewhat equivocal and perhaps not even competent (i.e., much of it is hearsay). It is Sanders' burden to initially show that a similarly situated employee had been treated differently. See also, Rawls v. PERC, 743 So.2d 592 (Fla. 4th DCA 1999). Sanders has failed in this regard, pertaining to the actions of Browning, Reed and Lee. Sanders has failed to show that Browning, Reed and Lee were similarly situated employees that engaged in on-duty misconduct while working as a probation officer. In addition, there is no evidence concerning whether Browning, Reed and Lee had similar lengths of service as Sanders or previously had been suspended.

Accordingly, I conclude that Sanders has not met the burden for showing disparate treatment and recommend that his dismissal not be mitigated and his appeal dismissed.

CONCLUSIONS OF LAW

Based on the record as a whole, I make the following conclusions of law:

1. The Commission has jurisdiction of this appeal.

2. Sanders was a permanent status law enforcement career service employee at the time of his dismissal, and the Agency is a State agency as defined by Chapter 110, Florida Statutes.

3. The Agency had cause for disciplinary action against Sanders for conduct unbecoming a public employee. §110.227(1), Fla. Stat. (2001).

4. The Agency's dismissal of Sanders should not be mitigated and his appeal should be denied and dismissed by the Commission.

RECOMMENDATION

I recommend that the Commission adopt the foregoing supplemental findings of fact and conclusions of law and my original findings and conclusions and dismiss Sanders' career service appeal.

Any party may file exceptions to my recommended order, by exceptions must be received by the Commission within five business days after the recommended order issued. See §110.227(6), Fla. Stat. (2001); Fla. Admin. Code Rule. 28-106.104 and 28-106.217(3). Parties should not expect to receive extensions of time to file exceptions in the most compelling situations.

ENDNOTE

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[1] All of the testimony related to this finding was admittedly hearsay and there was no independent support that arguably would support a finding pursuant to Section 120.57(1), Florida Statutes. (T 69, 72) However, I have assumed the facts were shown for the purposes of this order.

REMAND ORDER

September 19, 2001

On July 27, 2001, Robert Sanders appealed his dismissal by the Department of Corrections (Agency). After due notice, a hearing was conducted on August 22. On August 31, the hearing officers issued a recommended order concluding that Sanders engaged in conduct unbecoming a public employee and that his dismissal should not be mitigated. On September 10, Sanders filed six exceptions to the hearing officer's recommended order. A transcript of the evidentiary hearing has been filed with the Commission.

In exception 5b, Sanders contends that the hearing officer erred in failing to consider that the

Agency treated him disparately in the discipline it imposed. Sanders specifically refers to the cases of Agency employees Marsha Browning, Cerfornia Reed, and Sabreina Lee in support of his disparity argument. The hearing officer did not make findings regarding these employees, nor did he analyze whether their cases proved disparate treatment.

Accordingly, based on the record before him, the hearing officer is directed to make factual findings regarding Browning, Reed, and Lee as they relate to the issue of mitigation. The hearing officer shall also discuss whether the evidence proves disparity and, if so, how it affects his original recommendation. The hearing officer shall issue his supplemental recommended order within five business days from the date of this order. The parties shall have five business days from the issuance of the supplemental recommended order to file exceptions.

The Clerk of the Commission is directed to provide a copy of this order to the parties by facsimile transmission.

It is so ordered.

HEARING OFFICER'S RECOMMENDED ORDER -CORRECTIONS

August 31, 2001

Ruby, Hearing Officer.

On July 19, 2001, Robert M. Sanders was notified by the Department of Corrections (Agency) of his dismissal. Sanders filed a timely career service appeal on July 27. Thereafter, the Commission found the appeal sufficient and assigned the undersigned hearing officer. On August 22, an evidentiary hearing was conducted without objection by telephone between Tallahassee and Sarasota. At the close of the hearing, all parties indicated they would file post-hearing written submissions. These have been timely received and duly considered. A transcript of the hearing has not been filed.

ISSUES

The following issues were presented for resolution of this case:

1. Whether the Agency had cause to discipline Sanders?

2. Whether the severity of the disciplinary action taken should be mitigated, if there was cause for disciplinary action?

STIPULATIONS[1]

1. The Public Employees Relations Commission has jurisdiction of this case.

2. The Agency is a State agency and Sanders was a permanent status career service system employee in law enforcement classification at the time of his discharge within the meaning of Chapter 110, Florida Statutes.

FINDINGS OF FACT

Based on the testimony, exhibits, and the record as a whole, I make the following findings of fact:

1. Sanders was hired by the Agency as a correctional officer in February 1976 at the Desoto Correctional Institution (DCI). In April 1977, Sanders was promoted to the rank of correctional officer sergeant. In May 1982, Sanders was promoted to correctional probation officer at DCI.

2. In late 1999, the Agency decided to reclassify correctional probation officers working within its correctional institutions. Correctional officers had been working as "classification officers" within institutions such as DCI. The Agency decided to reclassify institutional probation officers as classification officers.

3. As a part of its transition program, the Agency presented a television program concerning the reclassification of probation officers within institutions to classification officers. The institutional probation officers were to be given an opportunity to remain within the probation officer classification by taking a probation officer vacancy in the field. Sanders decided that he wished to remain a certified probation officer. He indicated on a form on the day of the December 1999 program that he wished to accept a field probation officer position.

5. Because it did not receive sufficient applicants from institutional probation officers, the Agency offered them an opportunity to visit a local probation officer field office. DCI's superintendent knew of these

visitation opportunities but knew that Sanders had already made his decision to accept a field position. Therefore, she decided not to offer the opportunity for a field office visit to Sanders. In fact, Sanders could have visited such an office whether or not he had already accepted a field position.

6. Sanders believe that the televised announcement of an opportunity to transfer to a field probation officer position encompassed an offer of training as a field probation officer, but Sanders received no formal training. Rather, when he reported to the Agency probation and parole office in arcadia as a probation officer, his training consisted of portions of two days when his immediate supervisor, Terri McCall, drove Sanders around to the homes of persons assigned to Sanders as a part of his community control probation officer caseload.

7. Community control refers to a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by probation officers with restricted -caseloads. It is an individualized program in which the freedom of an offender is restricted within the community home or non-institutional residential placement and specific sanctions are imposed and enforced. The program is an alternative to institutionalization of offenders found guilty of a crime. It provides protection to the community through surveillance and control of cases and enforces confinement to the residence, with curfews and other restrictions.

9. Lisa Mendoza was sentenced to two years of community control in February 2000. Sandra Noyes-Campbell was sentenced to two years of community control supervision in July 2000. Correctional Probation Officer Marsha Browning supervised offender Noyes-Campbell. Sanders supervised Mendoza. Sanders also supervised Noyes-Campbell during Browning's absence in the fall of 2000.

10. In October 2000, Mendoza asked Sanders if she could leave her residence to take her children trick-or-treating for Halloween. Sanders approved her request, but McCall subsequently denied the request. A few days later, Mendoza reported to the Arcadia office with her two sons. Sanders approached Mendoza and apologized to her for not being able to take her children trick-or-treating. He then gave candy to Mendoza's boys. During that time, Noyes-Campbell was also present in the lobby of the Arcadia officer with her granddaughter. Sanders presented Campbell's grandchild with a stuffed animal.

11. Prior to the foregoing incidents, McCall had told Sanders she felt that it was not appropriate for Sanders to take a box of doughnuts for the children on a home visit to Mendoza. There are no restrictions, other than a known Agency prohibition against the giving of gifts to probationers or their families, upon a probation officer or any other Agency employee giving candy to children.

12. Crayons and coloring books were provided at DCI for inmates' children visiting inmates. With this background, Sanders did not believe that either giving

candy to a probationer's children or the giving of a stuffed animal was a violation of the Agency's prohibition against gifts. The stuffed animal was one of several that Sanders had won from a local restaurant machine and had placed in the probation office. Sanders had heard that another probation officer had given one of the stuffed animals that Sanders had placed in the probation office to another offender's child.

13. In April 2001, probation officer Browning returned to work after a period of absence while Sanders had supervised the probation of Noyes-Campbell. Browning informed Noyes-Campbell that Sanders had reported that he had observed Noyes-Campbell away from her residence, a violation of community control.

14. Noyes-Campbell became agitated at Browning's statement. Noyes-Campbell said that Sanders had "always been nice" and that she "did not understand how he could turn on her." Noyes-Campbell reported an incident in which Sanders had purchased beer for her husband and daughter's boyfriend during a November 2000 visit to Noyes-Campbell's home while Sanders was supervising Noyes-Campbell's probation.

16. The incident concerning the beer occurred on Saturday, November 4, 2000. Sanders was conducting an official visit at Noyes-Campbell's residence. Noyes-Campbell's husband, Michael, and Noyes-Campbell's daughter's boyfriend, Wayne Luper, were in the front yard working on an automobile. Michael Campbell was working under the car, working on brakes. As Sanders was departing Campbell's residence, he asked what kind of beer "they" liked, and Luper replied "Budweiser!"

Sanders left the residence, stopped at a local convenience store, and purchased a six-pack of Budweiser beer. Sanders returned to the home and gave the six-pack to Luper. Noyes-Campbell was present at the time of the incident. Sanders continued on duty to visit additional offenders.

17. Sanders' conduct, in giving candy to an offender's children and grandchildren, a stuffed toy to an offender's grandchild, and giving the beer to an offender's boyfriend is alleged to violate Agency Rules 33-208.001(4)(a), 33-208.002(1)(4)(a) and (6), and 33-.208.003(10), (22), (24), and (32). Sanders knew all of these rules prior to his conduct.

18. Florida Administrative Code Rule 33-208.001(4)(a), states, in relevant part, that employees are prohibited from conduct that would violate any state statute, rule, directive, or policy statement.

19. Florida Administrative Code Rule 33-208.002 contains the Agency's rules of conduct. Rule 33-208.002(1) states, in applicable part, that Agency employees are expected to keep themselves familiar and comply with all Agency rules and regulations during employment. Rule 33-208.002(4)(a) states, in applicable part, that an employee shall "conduct himself both on-duty and off-duty so as to command the respect of fellow employees, persons on parole, probation or otherwise under the supervision, inmates and the general public." Rule 33-208.002(6) states that "no employee shall solicit, trade, barter or accept a gift or any compensation from, or present a gift to, an inmate, an inmate's family, a person under supervision of the

department, his family, or any other person in behalf of an inmate or person under supervision, except as authorized. . ."

21. Rule 33-208.003 states the Agency's disciplinary standards. Rule 33-208.003(10 states that, for the offense of substandard quality and/or quantify of work, a first occurrence may be punished by an oral or written reprimand. Rule 33-208.003(22) states that, for conduct unbecoming a public employee, for a first offense, an employee may be punished by a written reprimand, up to thirty days suspension, or dismissal. Rule 33-208.003(24) states that, for willful violation of rules, regulations, directives or policy statements, an employee may be punished for a first offense with a written reprimand, up to thirty days suspension, or dismissal. Rule 33-208.003(32) states that, for failure to follow rules or written instructions, an employee may be punished by a written reprimand, up to thirty days suspension, or dismissal for a first offense.

23. The Agency has a Statement on Staff/Inmate/Offender Relationships (Statement) posted on bulletin boards where Sanders works. More specifically, Sanders had read this Statement posted on the bulletin board at the Arcadia probation office prior to the incidents in question occurring. That Statement included the following:

> The [Agency] encourages respect for the dignity and constitutional rights of persons committed to its custody and/or supervision. In addition, the [Agency] also expects that all interactions between staff

and those individuals under supervision to remain respectful, professional and shall not compromise the integrity of the individual and/or [Agency]. In accordance with Rule 33-208.002(27), Florida Administrative Code, the [Agency] will not tolerate any personal or social relationships between Department of Corrections' employees and its inmates or offenders under supervision. The security of our facility is jeopardized and the Department's integrity is damaged when employees carry on personal or social relationships with those in custody or under supervision. Furthermore, it is in violation of [Agency's] rule and Florida Statutes.

* * *

Any involvement between staff and inmates and/or person(s) under supervision including but not limited to the following shall be deemed inappropriate:

- Becoming personally involved in inmates'/offenders' private or family matters outside the scope of regular professional duties.
- Doing personal favors for inmates/offenders outside the scope of regular professional duties.
- Accepting, giving, or exchanging items and favors with inmates/offenders.

> - Discussing with an inmate/offender any matter pertaining to his/her crimes or the crimes of other inmates/offenders (except as required pursuant to official business).
> - Discussing with an inmate/offender personal and/or business maters of other staff.
> - Discussing the security operations of a facility with an inmate that could result in a breach of security.
> - Enforcing rules inconsistently to favor an inmate/offender or a group of inmates/offenders.
> - Having work done by an inmate/offender without authorization.
>
> If you have any further questions, please discuss the matter with your immediate supervisor.

24. Florida Administrative Code Rule 33-208.002(27), referenced in the preceding Statement, says:

> Employees shall maintain a professional relationship with all persons in the custody or under supervision of the [Agency], and their immediate families or visitors. No personal or business relationships are permitted. Marriage between employees and inmates is not permitted.

25. When Sanders started work at the Arcadia office, McCall told him that any questions he had concerning his conduct he should address to her. In fact, Sanders became concerned that he was perhaps spending too much time with the offenders under his custody when he learned that his predecessor had spent little time with the offenders. McCall told Sanders that he should spend sufficient time to get to know the offender and the offender's circumstances. She stated, "If this meant sharing a cup of coffee with the offender, you can do so."

ANALYSIS AND DISCUSSION

A permanent status career service system employee may be only discharged for cause. §110.227(1), Fla. Stat. (2001). The Agency has the burden of proving cause, and it must carry this burden by a preponderance of the evidence. See, Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412-415 (Fla. 4th DCA 1974); Barksdale v. Department of Professional Regulation, 2 FCSR ¶159 (1987). If the Agency fails to meet its burden, the Commission will sustain Sanders' appeal. §110.227(5)(c), Fla. Stat. (2001).

The Agency has two basic allegations against Sanders. First, it alleges various misconduct concerning Sanders' gifts to offenders' children and grandchildren. Specifically, these gifts are candy and a stuffed animal. Sanders presented evidence that various Agency employees did not consider this to be cause for disciplinary action. Viewed objectively, the conduct in question did not appear to violate the Agency's prohibition of "gifts." In fact, when viewed in relationship to Sanders' prior experience of the Agency having crayons and coloring books for the children visiting at DCI, his conduct of giving these gifts at work to children while their parents visited, especially when there was no evidence other than these occurrences taking place in connection with Halloween, indicates that the Agency reasonably did not have cause for these incidents. The incident concerning the beer, however, is more significant.

In any light, Sanders' conduct in delivering beer to the home of a criminal offender is troubling. Sanders testified that, when he was leaving, Luper stated "next time, you bring the beer." Luper was drinking a beer at that time. Sanders testified that he left, went to the highway, saw that he needed gas, went to a convenience store, and "on a whim" brought a six pack and went back and gave Luper the beer.

Sanders admits to bringing a six-pack back to the residence of an offender under his supervision. However, he contends that this offense is mitigated by the fact that he did not give the beer either to the offender, or to a relative of the offender, but to the boyfriend of the offender's daughter. Further, he states that he was told to spend time and "get to know" offenders by McCall, who suggested that he might "share a cup of coffee" with an offender.

Sanders tacitly admits that if he had given the beer directly to the offender he would have violated the Agency's reasonable standards of conduct prohibiting gifts to offenders and family members. Cf., Barrios v.

Department of Health and Rehabilitative Service, 9 FCSR ¶055 (1994) (cause found for giving beer to juvenile offenders under the supervision of the employee). The difficulty with Sanders' defense is that, while there is no evidence that he directly gave the beer to the offender or the offender's "family," Luper certainly was not an uninvolved bystander. Luper was the offender's daughter's boyfriend, who at one time was identified to Sanders as the offender's daughter's son-in-law, indicating a very close relationship between Luper and the family. Further, providing beer to the offender's daughter's boyfriend is not the same as discussing the offender's case over a cup of coffee.

Although Sanders is not expressly accused of violating Rule 33-208.002(27) in the Agency's disciplinary letter, he is expressly informed that his conduct was inappropriate and violative of the Agency's rules. Sanders disputes specific and intimate knowledge of the Agency's rules that he signed receipts for over his years of employment. However, he did concede that he had read the Statement concerning relationships that had been posted at his Arcadia office (in fact, it was one of his own exhibits). Rule 33-208.002(27) is incorporated into the Statement, and it reasonably states that personal relationships are prohibited as to "visitors" to offenders as well as tot he offenders and their families. Thus, Sanders knew or reasonably should have known of the Agency's concerns with personal relationships by its employees with offenders' "visitors" as well as immediate family.

Further, in considering the reasonableness of his conduct, I have considered that Sanders was working as a law enforcement officer at the time. Giving beer to persons on an offender's property certainly brings Sanders' status as a law enforcement officer into question. This is apparently why Noyes-Campbell became agitated when informed by her regular probation officer, Browning, that Sanders had said that he had observed Noyes-Campbell outside of the home, arguably violating the terms of her probation. Thus, Noyes-Campbell stated that Sanders had "always been nice" and she "did not understand how he could turn on her." These statements are reasonable for a person who saw Sanders buy a six-pack of beer for her daughter's boyfriend and bring it to the home for his and possibly the rest of the family's consumption. These were not reasonable acts of a person who was concerned with the strict enforcement of the law or terms of probation.

Conduct unbecoming a public employee is not only conduct that adversely affects the employee or the Agency in performing their required functions, but it is also conduct that appears to cast disrespect or adversely reflects upon the Agency or its employees, whether on or off duty. In a case where a State agency employee was off duty, driving an agency-owned vehicle, marked as such, stopped at a nude show, the employee reasonably knew or should have known that it would appear to citizens that he was on work time, using an agency vehicle, and engaging in non-State work-i.e., looking at the nude show. The hearing officer there concluded that the agency had cause to discipline the employee for conduct unbecoming a public employee. See, Radford v. Department of Transportation, 11 FCSR ¶009 (1996) (employee's conduct beyond poor judgment and was conduct unbecoming).

Sanders knew of the Agency's concerns with conduct by its employees that could engender disrespect both for the employee and the Agency. Despite this prior knowledge, he, while on-duty and attempting to accomplish the Agency's serious work of ensuring compliance with the terms of probation, decided to "on a whim" buy beer for a person whose relationship was not clear to him at the probationer's residence. Under these circumstances, Sanders brought disrespect for himself and the Agency in its efforts to accomplish its mission of enforcing the terms of probation on Noyes-Campbell. Noyes-Campbell's remarks affirmed this nexus when she stated that she could not understand Sanders' conduct in reporting her violation of the terms of her probation after his conduct in bringing beer to her home. Accordingly, the Agency has cause for disciplinary action for conduct unbecoming a public employee by Sanders concerning the beer incident. The other rule violations are subsumed within that ultimate finding.

Even though cause for discipline is proven, Sanders' dismissal may be mitigated pursuant to Section 110.227(6)(c), Florida Statutes, because of his status as a law enforcement/correctional officer. Dismissal is within the Agency's range of punishment for the offense of conduct unbecoming and may not be reversed upon that basis. The Legislature has not specified any criteria to apply in considering a request for mitigation of discipline. In addition, the Commission has not had an opportunity to interpret the new law. Accordingly, I will consider the following as to mitigation.

Although Sanders is a long-term employee and he had received letters of commendation concerning prior acts of heroism as well as promotions, he has previously been suspended in November 1990. Even though Sanders was a new probation officer without field training at the time of the offense, he was a very experienced correctional officer/institution classification officer in the context that he had knowledge of conduct that would bring discredit both upon himself and the Agency. As an experienced Agency employee, with years of prior service, Sanders should have known better than to give a six-pack of beer to the offender's daughter's boyfriend when his only basis for a relationship with the Noyes-Campbell family was as a probation officer assuring Noyes-Campbell's compliance with the terms of her probation.

Although the Agency may have a rule prohibiting the consumption of alcohol at DCI, it is inconceivable that Sanders would have offered a visiting inmate's friend a six-pack of beer in the parking lot of DCI even without such an expressed written rule. His conduct in giving beer to a person at an offender's residence, when his only reason for being at the residence was as an official Agency employee ensuring compliance with the terms of probation, is a patent offense that does not show a serious concern with reasonably upholding the standards of behavior of an Agency law enforcement officer.

In considering the seriousness of the offense, although Sanders' lengthy service does mitigate against the extreme punishment of dismissal, I have also considered that he had previously been suspended by the

Agency and thus does not have a perfect record. Accordingly, I recommend that the Commission does not mitigate Sanders' dismissal and dismiss his appeal.

CONCLUSIONS OF LAW

Based on the record as a whole, I make the following conclusions of law:

1. The Commission has jurisdiction of this appeal.

2. Sanders was a permanent status law enforcement career service employee at the time of his dismissal, and the Agency is a State agency as defined by Chapter 110, Florida Statutes.

3. The Agency had cause for disciplinary action against Sanders for conduct unbecoming a public employee. §110.227(1), Fla. Stat. (2001).

4. The Agency's dismissal of Sanders should not be mitigated and his appeal should be denied and dismissed by the Commission.

RECOMMENDATION

I recommend that the Commission adopt the foregoing findings of fact and conclusions of law and dismiss Sanders' career service appeal.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within five business days after the recommended order is issued. See 110.227(6), Fla. Stat. (2001); Fla. Admin. Code Rule 28-106.104 and 28-106.217(3). The Commission may not change the finds of fact or mitigation recommended (if any) in this order without first reviewing an official transcript of the hearing. Any party who desires the Commission to review the transcript must file one along with the exceptions. Alternatively, the Commission will consider a motion for a brief extension of time to file a transcript if the motion is filed along with the exceptions. Parties should not expect to receive extensions of time to file exceptions except in the most compelling situations.

ENDNOTE

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[1] Certain factual stipulations are incorporated into my findings below for stylistic purposes.